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-91-1972

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ADAM SPARKS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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June 1, 1992

QUESTIONS PRESENTED

I. HAS THE NINTH CIRCUIT COURT OF APPEAL MISCONSTRUED THIS COURT'S LANDMARK DECISION IN *WALKER V. BIRMINGHAM*, 388 U.S. 307 (1967), BY IGNORING THE FEDERALISM ASPECTS OF THAT OPINION?

II. IS SAN FRANCISCO'S RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE FACIALLY VIOLATIVE OF THE JUST COMPENSATION CLAUSE OF THE UNITED STATES CONSTITUTION, BECAUSE IT FORCES CERTAIN HOTEL OWNERS TO DEVOTE THEIR PRIVATE PROPERTY TO THE PUBLIC PURPOSE OF HOUSING THE HOMELESS, RATHER THAN IMPOSING THIS CIVIC BURDEN UPON THE TAX PAYING PUBLIC AS A WHOLE?

III. WERE PETITIONER'S SIXTH AMENDMENT RIGHTS VIOLATED WHEN HE WAS DENIED A JURY TRIAL IN A CONTEMPT PROCEEDING WHERE HE FACED A MAXIMUM AUTHORIZED SENTENCE OF 890 DAYS IN JAIL AND A $178,000 FINE?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. THE SAN FRANCISCO RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE 3

II. PROCEDURAL HISTORY 4
- A. The Complaint and Preliminary Injunction 4
- B. The Contempt Convictions 4
- C. State Court Habeas Proceedings 5
- D. Federal Habeas Proceedings in the District Court 6
- E. Ninth Circuit Review 9
- F. Other Pertinent Procedural Facts 10

TABLE OF CONTENTS

PAGE

REASONS FOR GRANTING THE WRIT 11

I. THE WRIT SHOULD BE GRANTED TO PREVENT A COLLISION BETWEEN FEDERAL AND STATE COURTS IN CALIFORNIA WITH RESPECT TO THE RESIDENTIAL HOTEL ORDINANCE 11

II. THE WRIT SHOULD BE GRANTED TO CLARIFY THE IMPORT OF THIS COURT'S LANDMARK DECISION IN *WALKER V. BIRMINGHAM* 12

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPLICATION OF ITS HOLDINGS IN *YEE V. CITY OF ESCONDIDO* AND *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, TO AN ORDINANCE REQUIRING DEDICATION OF PRIVATE PROPERTY TO A PUBLIC PURPOSE 15

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE INTER-CIRCUIT CONFLICTS RAISED BY PETITIONER'S JURY DEMAND 20

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE

Cases:

Albertson v. Millard, 345 U.S. 242 (1953) 13

Armstrong v. United States, 364 U.S. 40 (1953) 15, 16, 19

Baldwin v. New York, 399 U.S. 66 (1970) 22

Blanton v. Las Vegas, 489 U.S. 539 (1989) 22

Bullock v. City and County of San Francisco,
221 Cal.App.3d 1072 (1990) 6, 16

Burch v. Louisiana, 441 U.S. 130 (1979) 22

Codispoti v. Pennsylvania, 418 U.S. 506 (1974) 21

Duncan v. Louisiana, 391 U.S. 145 (1968) 22

Estelle v. McQuire, 112 S.Ct. 475 (1991) 13, 14

Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983) 21, 23

Hodel v. Irving, 481 U.S. 704 (1987) 18

In re Berry, 68 Cal.2d 137 (1968) 6, 14

In re Misener, 38 Cal.3d 543 (1988) 6

J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12 (N.H. 1981) . . 19

TABLE OF AUTHORITIES

PAGE

Cases Continued:

Maita v. Whitmore, 508 F.2d 143 (9th Cir. 1974), cert. den. 421 U.S. 947 (1974) 22, 23

National League of Cities v. Usery, 426 U.S. 833 (1976) 13

Nollan v. California Coastal Commission, 94 L.Ed. 697 (1987) 6, 15, 16, 18, 19

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 16

Powers v. Ohio, 111 S.Ct. 1364 (1991) 23

Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990) 23

Rife v. Godbehere, 814 F.2d 563 (9th Cir. 1987) 21, 23

Rose v. Hodges, 423 U.S. 19 (1975) 14

Rose v. Lundy, 455 U.S. 509 (1982) 13

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989) 5, 6, 16-20

Taylor v. Hayes, 418 U.S. 488 (1974) 22

Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal.App.3d 892 (1986) 6, 15, 16

Thomas v. Collins, 323 U.S. 516 (1945) 13

U.S. v. Bencheck, 926 F.2d 1512 (10th Cir. 1991) 23

TABLE OF AUTHORITIES

PAGE

Cases Continued:

U.S. v. O'Connor, 660 F.Supp. 955 (N.D. Ga. 1987) 23

United States v. Potvin, 481 F.2d 380 (10th Cir. 1973) 21

United States v. Seale, 461 F.2d 345 (7th Cir. 1972) 21

Walker v. Birmingham, 388 U.S. 307 (1967) 7-15

Yee v. City of Escondido, No. 90-1947, LEXIS, Genfed library, U.S. file (April 1, 1992) 15, 16

Younger v. Harris, 401 U.S. 37 (1971) 12, 13

Constitutional and Statutory Provisions:

United States Constitution, Amendment Five 2, 4-6, 9, 10, 15-20

United States Constitution, Amendment Fourteen 19

United States Constitution, Amendment Six 2, 5, 6, 10, 15, 20-23

San Francisco Administrative Code Chapter 41 (Residential Hotel Unit Conversion and Demolition Ordinance) 2-5, 7-12, 14-17, 20

TABLE OF AUTHORITIES

PAGE

Constitutional and Statutory Provisions Continued:

28 United States Code § 1257 ..... 2, 11

28 United States Code § 2241 14

Federal Rule of Appellate Procedure 22(b) 9

Law Review Article:

Sterk, Nollan, Henry George, and Exactions, 88 Columbia Law Review 1731 19

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered in this proceeding.

CITATIONS TO OPINIONS BELOW

The unpublished opinions of the United States Court of Appeal for the Ninth Circuit and the California Court of Appeal for the First Appellate District appear in the Appendix hereto.

JURISDICTION

The decision of the United States Court of Appeal for the Ninth Circuit was filed on March 4, 1992. This petition is filed within 90 days of that date. On May 27, 1992, the Ninth Circuit denied rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (Included in the Appendix hereto)

STATEMENT OF THE CASE

I. THE SAN FRANCISCO RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE

The San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (the "Residential Hotel Ordinance") is a frankly redistributive statute designed to shift the burden of housing San Francisco's poor, off the shoulders of the tax-paying--and voting--public as a whole, and onto the backs of a randomly selected and politically powerless minority of small hotel owners. Enacted for the stated purpose of preserving low income housing (San Francisco Administrative Code § 41.2), the Ordinance operates by designating hotel rooms occupied by the same individual for 31 days or more, on September 23, 1979, as "residential", and prohibiting rental of these rooms to tourists and business travelers on a nightly basis.

The purpose and effect of this legislative scheme is to force hotel owners to lease rooms designated "residential", at extremely low rentals, to economically marginal individuals, willing to live for an extended period in a single room without a kitchen. Residential hotel rooms are commonly occupied by the elderly, the disabled, the mentally ill, and alcoholics; as well as drug addicts, prostitutes, pimps, ex-felons, fugitives, and other criminals. Thus, residential hotels provide the City of San Francisco (the "City") with a convenient depository for individuals whom it cannot accommodate, or would prefer not to accommodate, in City housing projects.

A hotel owner whose rooms have been designated as "residential" may recapture his rooms for tourist use, only by paying the City an "in lieu fee" equal to 80 percent of the cost of constructing replacement units, plus site acquisition costs. (San Francisco Administrative Code § 41.13(a)(4)) Needless to say, the ransom price, so calculated, is guaranteed to exceed the value of the residential

hotel.[1] The Ordinance contains no hardship exception, and the City has stated that its provisions will be enforced mechanically, even if this drives small hotel owners into bankruptcy.

II. PROCEDURAL HISTORY

A. The Complaint and Preliminary Injunction

In December of 1988, the City filed suit against petitioner Adam Sparks ("Sparks") and his hotel, the Pacific Bay Inn, alleging that they were renting rooms to tourists in violation of the Residential Hotel Ordinance. San Francisco City Attorney, Louise Renne, called a press conference to announce the filing, and characterized it as a "test case".

The City promptly moved for a preliminary injunction requiring compliance with the Ordinance. Sparks opposed the motion for preliminary injunction, and cross-moved for a preliminary injunction against the City, urging that the Residential Hotel Ordinance effected a Taking of his property without Just Compensation, in violation of his rights under the Fifth Amendment to the United States Constitution. The California Superior Court granted the City's motion and denied Sparks' motion. A preliminary injunction was entered on April 6, 1988. Sparks appealed the preliminary injunction, and petitioned the trial court, the California Court of Appeal, and the California Supreme Court, for a stay pending appeal. No stay was granted.

B. The Contempt Convictions

Contempt proceedings to enforce the preliminary injunction commenced in 1989. In February of 1989, the Superior Court judge who entered the injunction, found Sparks guilty of 32 counts of contempt, fined him $8,000, and sentenced him to 32 days in the

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[1]The residential hotel owner also has the option of providing a new residential hotel to replace the hotel he has converted to tourist use. (San Francisco Administrative Code § 41.13(a)(1)) It is difficult to imagine how this scheme would provide the hotel owner with any benefit whatever.

county jail. In November of 1989, the process was repeated. At the second proceeding, Sparks demanded a jury trial because he was charged with 178 counts of contempt, and faced a maximum authorized sentence of 890 days in jail, and a fine of $178,000. The Superior Court denied Sparks' jury demand, found him guilty as charged, and sentenced him to 178 days imprisonment and a fine of $89,000.

C. State Court Habeas Proceedings

Following each of the contempt proceedings, Sparks filed a habeas corpus petition in the California Court of Appeal. In his first state habeas petition, Sparks urged that he should not be incarcerated because the underlying Residential Hotel Ordinance violated the Fifth Amendment to the United States Constitution, and because the contempt proceeding was deficient as a matter of state law. In his second habeas petition, Sparks repeated the allegations of his first petition, and added that he had been denied his constitutional right to jury trial. On each of the two occasions, the California Court of Appeal stayed Sparks' sentence pending review. During the period between the first and second contempt proceedings, New York's highest court issued its opinion in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), striking down, as facially violative of the Fifth Amendment to the United States Constitution, a New York City ordinance virtually identical to San Francisco's Residential Hotel Ordinance.

On January 22, 1991, the California Court of Appeal issued its decision in the habeas proceedings. The Court of Appeal annulled all 32 contempts from the first proceeding, and 172 out of 178 contempts from the second proceeding, due to state law evidentiary defects. This left six counts of contempt, carrying a penalty of 6 days in jail and a $3,000 fine.

Turning to Sparks' claim that the Residential Hotel Ordinance violated the Fifth Amendment to the United States Constitution, the Court of Appeal expressed itself thus:

> California permits attack on contempt orders based on purported violations of statutes or prior orders that are unconstitutional on their face. (See *In re Misener* (1988) 38 Cal.3d 543 [statute]; *In re Berry* (1968) 68 Cal.2d 137, 147-148 [court order].) Although petitioners do not press such an attack against the injunction, they do contend that the ordinance fails the test of constitutionality. Petitioners are incorrect. (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1088-1089; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 907-912.)

The Court of Appeal's decision failed to mention either the New York Court of Appeals' decision in *Seawall Associates, supra,* or this Court's seminal decision in *Nollan v. California Coastal Commission*, 94 L.Ed. 697 (1987). The Court of Appeal also rejected Sparks' Sixth Amendment claim, on the ground that each count of contempt was a "petty" offense, and that multiple counts could not be aggregated for purposes of determining Sparks' right to jury trial.

On March 4, 1991, Sparks filed a timely Petition for Review in the California Supreme Court. The California Supreme Court denied review on April 10, 1991.

D. Federal Habeas Proceedings in the District Court

On June 17, 1991, the City brought on an ex parte motion in San Francisco Superior Court, seeking an order for the arrest and body attachment of Adam Sparks. The Superior Court set a surrender date of 9:00 a.m., June 19, 1991.

On June 18, 1991, Sparks filed a petition for habeas corpus in the United States District Court for the Northern District of California, alleging that he would imminently be incarcerated in violation of his rights under the Fifth and Sixth amendments to the United States Constitution. The same day, the District Court issued

a temporary restraining order, staying Sparks' surrender to the County Sheriff, and setting a preliminary injunction hearing for June 27, 1991.

The preliminary injunction hearing commenced as scheduled at 10:00 a.m. on June 27, 1991, and continued before a packed courtroom until 4:19 in the afternoon. The primary issues debated during the course of this hearing were the constitutionality of the Residential Hotel Ordinance, and the effect of this Court's decision in *Walker v. Birmingham*, 388 U.S. 307 (1967). The City argued that *Walker* established a federal rule applicable in all cases, requiring a contemnor to serve his sentence regardless of whether the underlying statute was unconstitutional. Petitioner argued that *Walker* applied federalism principles by deferring to state law governing the treatment of persons violating injunctions issued pursuant to unconstitutional laws. California's rule permitting a citizen to assert unconstitutionality of the underlying law as a defense to contempt, deserved the same deference afforded the contrary rule adopted in Alabama.

At the close of the June 27, 1991 hearing, the District Court ruled as follows:

> **The Court:** ....With great reluctance, with extreme reluctance, this court is going to deny the application for an injunction and dismiss the petition.
>
> (pause in the proceedings)
>
> **The Court:** The ruling of *Walker* indicates that a party may be held in contempt for violation of a court order even though the underlying order may be unconstitutional. And the collateral bar rule tells us that the constitutionality of the underlying legislation or order should not be raised as a challenge to a contempt finding and citation.
>
> The smooth functioning of the judicial process would be jeopardized if parties could determine for themselves when and how to obey court orders, and that rule has been applied to injunctions.

People subject to injunctive orders issued by a court are expected to obey those decrees until they are modified or reversed, even if they have a substantial or proper ground to object to the order. This is true even though the statute--underlying statute in question were subject to substantial constitutional questions.

In the *Walker* case, the Court spoke with some degree of eloquence on this issue. It said, quote: "In the fair administration of justice, no man can be the judge in his own case." Irrespect--this is not a quotation. This is out of the quotes: Irrespective of his position in society, and however exalted his motives, the Court said essentially that litigants are free to ignore all the procedures of the law and carry their battle to the streets.

While one may sympathize with the petitioners' impatient commitment to their cause, respect for the judicial process is a small price to pay for the civilizing hand of law which alone can give abiding meaning to constitutional freedom.
The law provides for a method of raising the issue of the constitutionality of an ordinance. Under almost all circumstances, one of those procedures for raising the question of the constitutionality of an ordinance is not by ignoring a court order.

I cannot conclude these proceedings without making an observation as to the Ordinance itself.

(pause in proceedings)

The Court: The ordinance in question, the San Francisco Residential Hotel Demolition and Conversion Ordinance, adopted by the San Francisco Board of Supervisors in 1979, in the opinion of the Court, is an outrageous ordinance. To say that it is unfair and unjust would be a great understatement.

So far as this Court has been made knowledgeable of the Ordinance, so far as I know about the Ordinance as I sit here today--this is not a final opinion or decision, but from what I have seen and heard and read about it, it is an unconscionable and flagrantly unreasonable imposition of an attempt to resolve what the Board of Supervisors perceived as a social problem, an unreasonable method of attempting to resolve that social problem.

To avoid taking on the responsibility and facing up to the obligation of finding a solution which equally and equitably spreads the expense of solving that solution on the society of San Francisco by, I assume, raising taxes, the Supervisors have adopted what I consider to be a heinous and egregiously horrid solution.

This Ordinance, so far as the Court is familiar with it today, runs afoul of the Taking Clause of the United States Constitution in that it places obligations and restrictions on a certain small group of individual property owners that forces them to bear much more than their just share of obligations, which obligations rightfully belong to the whole society.

The law, as I see it, requires this Court to rule as I've indicated. Hopefully, somewhere down the path of our judicial system, what I consider to be an atrocious legislative enactment can be corrected and the wrongs perpetrated on certain members of society can be corrected.

It is the order of the Court that the Application for Injunction is denied and the Petition is dismissed.

E. Ninth Circuit Review

Sparks appealed dismissal of his federal habeas petition to the United States Court of Appeal for the Ninth Circuit, pursuant to Federal Rule of Appellate Procedure 22(b). The Ninth Circuit stayed his incarceration pending review.

On March 4, 1992, the Ninth Circuit issued an opinion affirming dismissal of Sparks' habeas petition. The Ninth Circuit held that *Walker v. Birmingham*, 388 U.S. 307 (1967), barred Sparks from raising unconstitutionality of the Residential Hotel Ordinance as a defense to his contempt conviction. The Ninth Circuit opinion failed to discuss the federalism and exhaustion of state remedies precepts underpinning *Walker*, which were fully briefed in both the District and Circuit courts.

With respect to Sparks' jury demand, the Ninth Circuit opined that the California courts violated Sparks' Sixth Amendment rights by characterizing each contempt count as a separate petty offense and denying him a jury. Nevertheless, the Circuit Court held that this constitutional violation was cured retroactively when the California Court of Appeal reduced the punishment imposed to six days in jail and a $3,000 fine, due to evidentiary defects.

On March 17, 1992, Sparks filed a timely petition for rehearing with suggestion for rehearing *en banc*, in the Ninth Circuit. The Ninth Circuit required the City to file a response to the rehearing petition. On May 27, 1992, the Ninth Circuit denied rehearing. Sparks presently remains at liberty.

F. Other Pertinent Procedural Facts

On September 30, 1991, a trade association of San Francisco residential hotels, filed suit in the United States District Court for the Northern District of California, seeking a declaratory judgment declaring the Residential Hotel Ordinance facially violative of the Fifth Amendment to the United States Constitution. (*Golden Gate Hotel Association v. City and County of San Francisco, et al.*, 91-3386 JPV) This action was assigned to the Honorable John P. Vukasin, Jr., the same judge who heard Sparks' habeas petition. Plaintiff trade association has moved for summary judgment declaring the Residential Hotel Ordinance facially unconstitutional. The District Court has ruled that the facial constitutional challenge is ripe for adjudication, and taken the summary judgment motion under submission.

At the same time, multiple Residential Hotel Ordinance enforcement actions remain pending against San Francisco hoteliers, in the San Francisco Superior Court.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO PREVENT A COLLISION BETWEEN FEDERAL AND STATE COURTS IN CALIFORNIA WITH RESPECT TO THE RESIDENTIAL HOTEL ORDINANCE

As is apparent from the preceding procedural history, events have now reached a juncture at which a critical conflict has arisen between the courts of this nation's two most populous states, and between the local state and federal courts in San Francisco, with regard to the constitutionality of San Francisco's Residential Hotel Ordinance. This situation carries the seeds of legal chaos.

Absent some unexpected change of circumstance, United States District Judge Vukasin's opinion with respect to the constitutionality of the Residential Hotel Ordinance, expressed as dicta in the Sparks federal habeas proceeding, may imminently be embodied in a judgment declaring the Residential Hotel Ordinance unconstitutional.

The federal District Court's ruling on the constitutionality of the Residential Hotel Ordinance may not, however, be binding upon the San Francisco Superior Court. It is entirely possible that the multiple state court Residential Hotel Ordinance enforcement actions, will go forward in the teeth of a federal holding of facial unconstitutionality. How juries will be instructed concerning § 1983 counterclaims, under these circumstances, is an open question.

The precise effect of such a head-on collision between the state and federal courts in San Francisco, turns upon the correct interpretation of this court's landmark decision *Walker v. Birmingham*, 388 U.S. 307 (1967). If, as petitioner contends, *Walker* permits San Francisco residential hotel owners convicted of contempt, to raise facial unconstitutionality of the Residential Hotel Ordinance as

a defense in federal habeas proceedings, these hotel owners may still be forced to endure state court contempt proceedings, but they will ultimately be afforded a federal remedy for infringement of their constitutional rights. If, on the other hand, *Walker* is read to prohibit residential hotel owners convicted of contempt, from raising unconstitutionality of the Residential Hotel Ordinance as a defense in federal habeas proceedings, the hotel owners will be left without a remedy. A judgement of the federal district court, or even the Ninth Circuit, declaring the Residential Hotel Ordinance facially unconstitutional, could prove to be worth no more than the paper on which it is written.[2]

The increasing chaos surrounding enforcement of San Francisco's Residential Hotel Ordinance can only be resolved by a decision of this Court, which is binding upon all San Francisco courts, state and federal. Certiorari should accordingly be granted.

II. THE WRIT SHOULD BE GRANTED TO CLARIFY THE IMPORT OF THIS COURT'S LANDMARK DECISION IN *WALKER V. BIRMINGHAM*

This petition raises two major questions concerning the import of this Court's landmark decision in *Walker v. Birmingham*, 388 U.S. 307 (1967). First, is *Walker* a federalism case, which honors the right of states to impose any rule concerning contempt which does not offend the United States Constitution? Or is it a supremacy case, which imposes a uniform rule concerning contempt upon all states? Second, what impact does a petitioner's exhaustion of state remedies, prior to violation of an injunction, have on the outcome under *Walker*?

In *Walker v. Birmingham*, 388 U.S. 307 (1967), the Reverend Martin Luther King, Jr., and several of his colleagues, led a civil rights march, in violation of an injunction issued pursuant to a

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[2]A federal injunction prohibiting the City of San Francisco from enforcing its Residential Hotel Ordinance might appear to present a solution. This course, however, is at least arguably proscribed by the rule of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.

facially unconstitutional Birmingham, Alabama parade ordinance. Reverend King and his colleagues made no effort to challenge the injunction in the Alabama state courts or to otherwise avail themselves of state court remedies. Instead, they proceeded directly to federal court, where they asserted unconstitutionality of the Birmingham ordinance as a defense to their contempt convictions. This Court affirmed the contempt convictions, deferring to the long-established Alabama rule which prohibited contemnors from raising unconstitutionality of an underlying statute or ordinance as a defense to contempt. In so holding, this Court emphasized that the Alabama rule was not unconstitutional. Thus, the contemnors, having notice of the Alabama rule, should be required to serve their jail terms. (*Walker*, *supra*, 388 U.S. at 319-320)

The *Walker* court did, however, note that the result would have been different had the petitioners exhausted their state court remedies prior to disobeying the injunction: "This case would arise in quite a different procedural context if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had met with delay or frustration in their constitutional claims." (*Walker*, *supra*, 388 U.S. at 318)[3]

Justice Stewart's 1967 opinion for a majority of five justices in *Walker*, was prescient in several important respects. It presaged the federalism concerns underlying such later cases as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Younger v. Harris* 401 U.S. 37 (1971), where this Court upheld the right of states to autonomously manage their internal affairs, including their justice systems. *Walker* also presaged such cases as *Rose v. Lundy*, 455 U.S. 509 (1982) and *Estelle v. McQuire*, 112 S.Ct. 475 (1991), in which this Court held that federal courts reviewing habeas corpus petitions should not entertain legal questions which were not raised in the state courts, or legal questions which do not turn upon federal law. The approach adopted by the *Walker* court was consonant with the principle that state supreme courts are the final arbiters of state law,

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[3]See also *Thomas v. Collins*, 323 U.S. 516 (1945), applying the same legal principle.

and their decisions are subject to revision in the federal courts only when the state law, as construed by the state's highest court, violates the United States Constitution. (See *Albertson v. Millard*, 345 U.S. 242, 246 (1953))

As this court stated only last year in *Estelle v. McQuire*, 112 S.Ct. 475, 480 (1991):

> it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975) (*per curiam*).

Had *Walker v. Birmingham*, been afforded an accurate reading in the Ninth Circuit, it would have been held to require reinstatement of Sparks' federal habeas petition. The federalism concerns which underpin *Walker*, require that California's *Berry*[4] rule, providing that unconstitutionality of an underlying ordinance may be asserted as a defence in contempt proceedings, must be afforded the same deference as Alabama's contrary rule. Furthermore, if *Walker* were read accurately, Sparks would also be permitted to raise the unconstitutionality of San Francisco's Residential Hotel Ordinance on federal habeas, because he exhausted his state court remedies prior to violating the state court injunction.

The reading which the Ninth Circuit in fact afforded *Walker*, was a dangerous departure from established precedent. The Ninth Circuit's approach: 1) rewarded the City for raising a new legal question for the first time on federal habeas, 2) encouraged the parties to relitigate questions of state law in federal court, 3) encouraged the district court to substitute its own rule for a constitutionally permissible rule adopted by the state's highest court,

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[4]See *In Re Berry*, 68 Cal.App.2d 132 (1968).

and 4) improperly interfered with the state of California's administration of its own justice system.

The only questions properly before the District Court in the habeas proceding were the two federal constitutional questions raised by Sparks: to wit, his facial constitutional challenge to the Residential Hotel Ordinance, and his Sixth Amendment jury trial claim. The excursion into relitigation of state law issues, originally invited by the City and ultimately sanctioned by the Ninth Circuit, was in no way authorized by this Court's opinion in *Walker v. Birmingham*. This court should grant certiorari to clarify the import of its opinion in *Walker*, and uphold the right of state courts to fashion their own common law, within the bounds of the federal constitution, free from unwarranted federal intrusion.

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPLICATION OF ITS HOLDINGS IN *YEE V. CITY OF ESCONDIDO* AND *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, TO AN ORDINANCE REQUIRING DEDICATION OF PRIVATE PROPERTY TO A PUBLIC PURPOSE

The conflict between the state and federal courts in San Francisco surrounding enforcement of the Residential Hotel Ordinance exemplifies a larger conflict. The courts of this nation's most populous state either fail to grasp or refuse to accept, the constraints which the Fifth Amendment to the United States Constitution places upon governmental appropriation of private property. The California courts have repeatedly chosen to ignore the opinions of this Court interpreting the Fifth Amendment.

Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal.App.3d 892 (1986), was the first constitutional challenge to the Residential Hotel Ordinance to reach the California Court of Appeal. In *Terminal Plaza*, that court professed itself "concerned that the Ordinance places a disproportionate share of the burden of providing low cost housing upon residential hotel property owners, rather than fairly dispersing the cost of conferring such a social benefit upon society as a whole." (*Terminal Plaza*, *supra*, 177

Cal.App.3d at 912) This, of course, rendered the Ordinance unconstitutional under the test enunciated by this Court in *Armstrong v. United States*, 364 U.S. 40 (1953), and reaffirmed in dicta in *Yee v. City of Escondido*, No. 90-1947, LEXIS, Genfed library, U.S. file (April 1, 1992). As this Court opined in *Armstrong*, a law runs afoul of the Fifth Amendment, where government "force[s] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong, supra*, 364 U.S. at 49) Stated slightly differently in *Yee*, an unconstitutional regulatory taking occurs when an "ordinance unjustly imposes a burden on petitioners that should be compensated by the government, rather than remaining disproportionately concentrated on a few persons." (*Yee, supra*, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124) Nevertheless, the *Terminal Plaza* court declined to strike down the patently unconstitutional ordinance.

In *Bullock v. City of San Francisco*, 221 Cal.App.3d 1072 (1990), the California courts persisted in ignoring United States Supreme Court precedent. The *Bullock* court again rejected a constitutional challenge to the Residential Hotel Ordinance, this time noting California's "tolerant" attitude toward land use regulation. (*Bullock, supra*, 221 Cal.App.3d at 1089) The *Bullock* court failed to discuss this Court's decision in *Nollan v. California Coastal Commission*, 92 L.Ed.2d 677 (1987), which case was then three years old and fully briefed by the parties. Indeed, the *Bullock* court frankly abdicated responsibility, observing: "If a change is to be made, it must come from a higher court." (*Bullock, supra*, 221 Cal.App.3d at 1089) In the Sparks case, the same appellate panel summarily disposed of Sparks' constitutional challenge with a citation to *Bullock*. The California Supreme Court has consistently refused to grant review in any case involving the San Francisco Residential Hotel Ordinance.

In marked contrast to the California courts, the New York State courts have shown considerable respect for the dictates of the Fifth Amendment as elucidated in the recent opinions of this Court. Of particular interest is the New York Court of Appeals' well reasoned opinion in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), cert. den. 107 L.Ed.2d 503 (1989), which applies

the principles enunciated by this Court in *Nollan v. California Coastal Commission*, 94 L.Ed. 697 (1987), to strike down a New York City law virtually indistinguishable from the San Francisco Residential Hotel Ordinance.[5] It provides an excellent starting point for the analysis this Court should apply.

The *Seawall* court commenced its analysis by observing that the key question "in any case where government action is challenged as violative of the right of just compensation, is whether the uncompensated obligations and restrictions imposed by the governmental action, force individual property owners to bear more than a just share of obligations which are rightfully those of society at large." (*Seawall*, *supra*, 542 N.E.2d at 1062)

In holding that New York City's residential hotel ordinance did effect a Taking of hotel owners' property, the New York Court of Appeals focused on several distinct factors. Firstly, the owners were required to devote their private property to a public purpose:

> Owners are forced to devote their properties to a ... use which, albeit one which might serve the City's interests, bears no relation to any economic purpose which could reasonably be contemplated by a private investor....
>
> * * *
>
> [T]he City, by affirmatively requiring the owners to put their properties to a public use, is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good.

(*Seawall*, *supra*, 542 N.E.2d at 1066, 1070)

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[5]The most significant difference between the New York City Ordinance and the San Francisco Ordinance is that the New York City Ordinance contained a hardship exemption for hotel owners who were earning less than 8 1/2 percent per annum on their investment. The San Francisco Ordinance, by contrast, is totally merciless. It is, *a fortiori*, unconstitutional.

Secondly, to the extent that the ordinance required certain citizens to operate their properties as residential hotels, the ordinance interfered with the owners' right to develop or sell their properties. (*Seawall, supra*, 542 N.E.2d at 1066-1067, citing *Hodel v. Irving* (1987) 481 U.S. 704)

Thirdly, New York City had failed to satisfy the "close nexus" requirement imposed by this Court in *Nollan*:

> [Under *Nollan*,] the heavy exactions imposed by [the New York City residential hotel ordinance] must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required close "nexus" has been made. Rather, the nexus between the obligations placed on [residential hotel] property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem. Indeed, by equating the "cure" with dollars--i.e., permitting "buy-out" payments of $45,000 per [residential hotel] unit in lieu of keeping the units available for rent [see discussion of "buy-out" exemption, *infra*]--the terms of the Law itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.

(*Seawall, supra*, 542 N.E.2d at 1069)

The Court of Appeals was not impressed by New York City's contention that the Ordinance's buy-out, replacement, and hardship provisions rendered the law constitutional:

> [T]he City, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the City not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a "ransom" cannot make it lawful. Indeed, the stark alternatives

> offered by [this] Law--either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units)--amount to just the sort of exaction which could be classified, not as "a valid regulation of land use but, 'an out-and-out plan of extortion.'" (*J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981))" (*Nollan v. California Coastal Comm.*, *supra*, 483 U.S. at 837, 107 S.Ct. at 3148; *see also, Sterk, Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731, 1746-1751.)

(*Seawall, supra*, 542 N.E.2d at 1069-1070. Footnote omitted.)

The *Seawall* court was eloquent in conclusion:

> [The challenged ordinance] force[s] property owners "alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." (*Armstrong v. U.S.*, *supra*, at 49) Because the owners are, by the terms of the law, afforded no compensation, [the ordinance], we hold, is facially invalid, under the "takings" clauses of both the federal and state constitutions. (U.S. Const. Amends. 5, 14, NY Const. Art. 1, § 7)

* * *

> No one disputes that the City has the power to prohibit the demolition of [residential hotel] properties, or direct restoration of [residential hotel] units to habitable condition to be leased at modest rents for indefinite periods. The City clearly has that power. The question is who is to pay for this, and, more particularly, whether the City--in accordance with constitutional mandate--must compensate property owners before it can "place [them] in a business, force them to remain in that business and refuse to allow them to ever cease doing [that] business." [citation] The issue is not one of "economic due process", but constitutional command.

> No one minimizes the tragic reality of homelessness. But the City's response--to foist its responsibility on certain private property owners, by requiring them to remain in the [residential hotel] business or ransom their property rights--simply does not meet the requirements of the federal and state constitutions.

(*Seawall*, *supra*, 542 N.E.2d at 1070-1071)

San Francisco's Residential Hotel Ordinance is indistinguishable from the New York City ordinance declared unconstitutional by the New York Court of Appeals in *Seawall*. This Court should adopt the well-considered reasoning of *Seawall*, and grant certiorari to declare the Residential Hotel Ordinance facially violative of the Fifth Amendment to the United States Constitution.

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE INTER-CIRCUIT CONFLICTS RAISED BY PETITIONER'S JURY DEMAND

Petitioner Sparks demanded, and was denied, a jury, in a proceeding where he faced a maximum authorized jail sentence of 890 days and a maximum authorized fine of $178,000. This, on its face, would appear to violate Sparks' rights under the Sixth Amendment to the United States Constitution. The California Court of Appeal, however, held that Sparks was not entitled to trial by jury because each of the 178 counts of contempt with which he was charged, constituted a separate "petty" offense triable to the court. On federal habeas corpus, the Ninth Circuit impliedly rejected this position, but nevertheless opined that the California Court of Appeal retroactively cured the constitutional violation, by annulling all but six of Sparks' 210 contempt convictions and thereby reducing his punishment to six days in jail and a $3,000 fine.

Sparks' Sixth Amendment claim now implicates two distinct questions of law:

1) Should each count of contempt be viewed as a separate petty offense, or should all the counts of contempt tried in a single proceeding, be viewed in the aggregate?

2) Must the right to jury trial be determined prospectively, based upon the defendant's "exposure" at the commencement of trial, or may the reviewing court consider the sentence which the defendant ultimately received?

The federal case law speaking to each of these questions is in considerable disarray, although the greater weight of authority favors petitioner's position.

With respect to "aggregation", this Court's opinion in *Codispoti v. Pennsylvania*, 418 U.S. 506, 509-510 (1974), as well as the federal appellate cases of *Rife v. Godbehere*, 814 F.2d 563 (9th Cir. 1987); *Haar v. Hanrahan*, 708 F.2d 1547 (10th Cir. 1983); *United States v. Potvin*, 481 F.2d 380 (10th Cir. 1973), and *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972), all support the proposition that multiple petty offenses, tried collectively, must be viewed in the aggregate for purposes of determining the right to jury trial. This approach makes good sense, since the contrary approach would permit creative prosecutors to deliberately deprive criminal defendants of their right to jury trial, by carving up felonies into multiple petty offenses. A like-minded judge and prosecutor, could put an accused embezzler behind bars for the rest of his natural life, without benefit of jury trial, simply by dividing a grand larceny charge into multiple petty thefts. Moreover, as the Tenth Circuit observed in *Potvin*, from the defendant's standpoint, a one year sentence is a one year sentence, regardless of whether it results from a single charge or multiple charges.

Nevertheless, the California Court of Appeal refused to aggregate Sparks' contempt counts for purposes of determining his

right to jury trial, and at least one federal case supports this position. (See *Maita v. Whitmore*, 508 F.2d 143 (9th Cir. 1974), cert. den. 421 U.S. 947 (1974)) This Court should grant certiorari to establish a clear and comprehensible rule of aggregation.

The second question bearing upon the Sixth Amendment issue in this case, is whether an appellate court, in reviewing denial of a jury demand, must consider only the maximum authorized penalty which the defendant faced at the commencement of trial, or whether it may take into account the actual penalty imposed, either by the trial court, or at a later stage of the proceedings. Analysis of the federal authorities on point reveals a sharp clash of opinion between the circuits.

The decisions of this Court establish that where the maximum authorized penalty for a crime is specified by statute, the right to jury trial turns upon the legislatively authorized penalty and not upon the penalty actually imposed. (See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (reversal for denial of jury demand, where actual penalty was 60 days and $50, but authorized penalty was two years imprisonment); *Burch v. Louisiana*, 441 U.S. 130, n.6 (1979) (reversal of suspended sentence and $1,000 fine, because "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Accord, *Baldwin v. New York*, 399 U.S. 66, 69 (1970): "The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is.") Where no specific penalty is authorized by statute, however, the right to jury trial turns upon the penalty actually imposed. (*Taylor v. Hayes*, 418 U.S. 488 (1974)) This Court's most recent opinion in *Blanton v. Las Vegas*, 489 U.S. 539 (1989), reaffirms each of the foregoing rules.

Applying the foregoing principles to the case at bar, it would appear that because petitioner Sparks faced a statutorily authorized penalty of 890 days in jail and a fine of $178,000, at the commencement of trial, his Sixth Amendment rights were violated when the Superior Court denied his jury demand. (*Duncan, supra*; *Burch, supra*; *Baldwin, supra*; *Blanton, supra*) In the eight and tenth judicial circuits, this blatant violation of Sparks' constitutional rights would have

entitled him to reversal of his conviction. (See *Haar v. Hanrahan*, 708 F.2d 1547, 1552 (10th Cir. 1983) ("potential penalty" at "commencement of trial" controlling.) Accord, *U.S. v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991); *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). See also *U.S. v. O'Connor*, 660 F.Supp. 955, 956 (N.D. Ga. 1987))

The Ninth Circuit, however, has declined to follow this logical rule, insisting instead, that in cases involving aggregation of multiple counts in a single trial, violation of a defendant's right to jury trial may be cured retroactively by reduction of the punishment after trial. (See *Rife v. Godbehere*, 814 F.2d 563, 564 (9th Cir. 1987), *amended*, 825 F.2d 185 (9th Cir. 1987). See also *Maita v. Whitmore*, 508 F.2d 143, 146 (9th Cir. 1975), reciting the same rule and acknowledging conflict with Tenth Circuit law.)

The Ninth Circuit rule finds no support in Supreme Court precedent, and is contrary to public policy. It provides trial counsel with no guidance as to when a jury may be demanded, and gives any judge with a motive for denying jury trial the means by which to do so. In a contempt case, such as the case at bar, the Ninth Circuit rule gives the trial judge the power to ensure that no jury stands between his personal vengeance and the defendant. In the case of a court with a heavy docket, the Ninth Circuit rule may encourage judges to routinely deprive defendants of their precious Sixth Amendment rights.

In summary, this Court has recently taken pains to assure the quality of criminal jury trial under the Sixth Amendment. (See *Powers v. Ohio*, 111 S.Ct. 1364 (1991)) Such efforts will, however, be wasted, unless similar pains are taken to define the scope of the right to jury trial. Certiorari should be granted to resolve the important Sixth Amendment issues raised by this case.

CONCLUSION

For the aforestated reasons, this Court should grant a writ of certiorari to review the decision of the Ninth Circuit Court of Appeal, affirming dismissal of Adam Sparks' petition for habeas corpus.

Respectfully submitted,

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June 1, 1992

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ADAM SPARKS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

APPENDIX
TABLE OF CONTENTS

PAGE

I. SAN FRANCISCO RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE (S.F. ADMINISTRATIVE CODE, CHAPTER 41). 1a

II. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. 46a

III. ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC. 53a

IV. ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REQUIRING A RESPONSE BY APPELLEE TO PETITION FOR REHEARING. 54a

V. ORDER OF THE CALIFORNIA SUPREME COURT DENYING PETITION FOR REVIEW. 55a

VI. ORDER OF THE CALIFORNIA COURT OF APPEAL DENYING PETITION FOR REHEARING. 56a

VII. JANUARY 22, 1991 OPINION OF THE CALIFORNIA COURT OF APPEAL. 57a

VIII. ORDER OF THE CALIFORNIA COURT OF APPEAL GRANTING REHEARING. 72a

IX. NOVEMBER 14, 1990 OPINION OF THE CALIFORNIA COURT OF APPEAL. 73a

CHAPTER 41

RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION

Sec. 41.1. Title.
Sec. 41.2. Purpose.
Sec. 41.3. Findings.
Sec. 41.4. Definitions.
Sec. 41.5. Applicability of this Chapter.
Sec. 41.6. Initial Status Determination.
Sec. 41.7. Statements of Exemption; Applicability of this Chapter.
Sec. 41.8. Requirements for Nonprofit Organizations.
Sec. 41.9. Records of Use.
Sec. 41.10. Annual Usage Report.
Sec. 41.11. Administration.
Sec. 41.12. Permit to Convert.
Sec. 41.13. One-for-one Replacement.
Sec. 41.14. Mandatory Denial of Permit to Convert.
Sec. 41.15. Approval and Issuance of Permit to Convert.
Sec. 41.16. Appeal of Denial or Approval of Permit to Convert.
Sec. 41.17. Rights of Permanent Residents.
Sec. 41.18. Demolition.
Sec. 41.19. Temporary Change of Occupancy.
Sec. 41.20. Unlawful Conversion; Remedies; Fines.
Sec. 41.21. Annual Review of Residential Hotel Status.
Sec. 41.22. Construction.

SEC. 41.1. TITLE. This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance. (Added by Ord. 121-90. App. 4/12/90)

SEC. 41.2. PURPOSE. It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and conversion of residential hotel units to other uses,

and by appropriate administrative and judicial remedies. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.3. FINDINGS. The Board of Supervisors finds that:

(a) There is a severe shortage of decent, safe, sanitary, and affordable rental housing in the City and County of San Francisco, and this shortage affects most severely the elderly, the disabled and low-income persons.

(b) The people of the City and County of San Francisco, cognizant of the housing shortage of San Francisco, on November 4, 1980, adopted a declaration of policy to increase the city's housing supply by 20,000 units.

(c) Many of the elderly, disabled and low-income persons and households reside in residential hotel units.

(d) A study prepared by the Department of City Planning estimated that there were only 26,884 residential hotel units in the City in December of 1979, a decrease of 6,098 such units from 1975. Since enactment of this Chapter, residential hotel units have continued to decrease, at a slower rate; in 1981, there were 20,466 residential hotel units as defined by this Chapter; in 1988, there were 18,723 residential hotel units, a decrease of 1,743 over a period of 7 years. The decrease is caused by vacation, conversion or demolition of residential hotel units. Continued vacation, conversion or demolition of residential hotel units will aggravate the existing shortage of affordable, safe and sanitary housing in the City and County of San Francisco.

(e) As a result of the removal of residential hotel units from the rental housing market, a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households.

(f) Residential hotel units are endangered housing resources and must be protected.

(g) The Board of Supervisors and the Mayor of the City and County of San Francisco recognized this housing emergency and enacted an ordinance which established a moratorium on the demolition or conversion of residential hotel units to any other use. The moratorium ordinance became effective on November 21, 1979.

(h) The conversion of residential hotel units affects those persons who are least able to cope with displacement in San Francisco's housing market.

(i) It is in the public interest that conversion of residential hotel units be regulated and that remedies be provided where unlawful conversion has occurred, in order to protect the resident tenants and to conserve the limited housing resources.

(j) The tourist industry is one of the major industries of the City and County of San Francisco. Tourism is essential for the economic well being of San Francisco. Therefore, it is in the public interest that a certain number of moderately priced tourist hotel units be maintained especially during the annual tourist season between May 1st and September 30th.

(k) Tourist activity has increased steadily in San Francisco since 1983. There are currently approximately 23,000 tourist hotel units in the City and over 3,000 additional such units will be added by 1988 through new construction. However, there are presently only 18,723 residential hotel units and this number is not increasing. In addition, rents for residential hotel units have risen an average of 23 percent annually since 1980, making such units less and less affordable as a housing resource for the elderly, disabled and low-income persons. Since the adoption of this ordinance, hotel owners have begun to leave residential units vacant during the non-tourist season (October 1st--April 30th) in order to rent these units to tourists at high daily rental rates during the tourist season (May 1st--September 30th). This activity, which further reduces the available supply of low and moderate income housing in San Francisco, is not presently prohibited under this Chapter. In order to assure that residential

hotel owners do not continue to withhold these available residential units from prospective permanent residents during the non-tourist season, it is necessary to restrict the tourist season rental of vacant residential hotel units. Such a restriction will not interfere with San Francisco's tourism, which remains essential to the economic well-being of the City.

(l) Since enactment of this Chapter, it has become apparent that portions of this Chapter were difficult and extremely costly to interpret and enforce, resulting in an inability to fulfill the essential interests of this Chapter and to prevent illegal conversions.

(m) Since enactment of this Chapter, residential units have been converted to tourist units and the hotel operators have paid the 40 percent in-lieu fee to the City. This amount, 40 percent of the cost of construction of comparable units plus site acquisition costs, has not been adequate to provide replacement units. Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to makeup the shortfall between the 40 percent in-lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989.

(n) Certain uses provide both living accommodations and services, such as health care, personal care and counseling, to residents of the City. Examples of such uses are hospital, skilled nursing facility, AIDS hospice, intermediate care facility, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly, and community care facility. Such facilities are often operated in buildings owned or leased by non-profit organizations and provide needed services to the City's residents. To subject such facilities to the provisions of this Chapter may deter future development of such facilities. It is desirable that such facilities exist and the City should encourage construction and operation of such facilities.

(o) In addition, a form of housing facilities called "transitional housing" provides housing and supportive services to homeless individuals and families to facilitate the movement of homeless individuals and families to independent living or longer term supportive residences in a reasonable amount of time. Transitional housing has individual living quarters with physical characteristics often similar to a residential hotel (i.e. accommodations which provide privacy to residents) and provides a source of interim housing for homeless individuals and families seeking to live independently.

(p) The City's public, quasi-public and private social agencies serving the elderly and needy persons often find it difficult to immediately locate suitable housing units for such persons returning to independent living after hospitalization or upon leaving skilled-nursing or intermediate care facilities within a short time after their discharge from a health facility. Such persons often will require minimum supervision and other interim social service support. The provision of a suitable number of housing units for such emergency needs until permanent housing may be secured and supportive services arranged are necessary and desirable for the City. Emergency housing will have physical characteristics similar to "transitional housing" and is often intended to be occupied for a period of less than one month.

(q) The City also wished to provide a positive incentive to encourage residential hotel owners and operators to comply with the terms of this Chapter. Hotel owners have expressed a need to rent certain residential units on a short term basis during the winter month. In an effort to address this need and to encourage compliance with this Chapter, the City wishes to provide an opportunity to hotel owners who have complied with the terms of this Chapter to rent a limited number of residential units to tourist during the winter months. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.4. DEFINITIONS. (a) Certificate of Use. Following the initial unit usage and annual unit usage determination pursuant to the provisions of Sections 41.6 and 41.10 below, every hotel shall be issued a certificate of use specifying the number of residential and tourist units herein.

(b) Comparable Units. A unit which is similar in size, services, rental amount and facilities, and which is located within the existing neighborhood or within a neighborhood with similar physical and socioeconomic characteristic.

(c) Conversion. The change or attempted change of the use of a residential unit as defined in subsection (q) below to a tourist use, or the elimination of a residential unit or the voluntary demolition of a residential hotel. However, a change in the use of a residential hotel unit into a noncommercial use which serves only the needs of the permanent residents, such as resident's lounge, storeroom or common area, shall not constitute a conversion within the meaning of this Chapter.

(d) Disabled Person. A recipient of disability benefits.

(e) Elderly Person. A person 62 years of age or older.

(f) Emergency Housing. A project which provides housing and supportive services to elderly or low-income persons upon leaving a health facility and which has its primary purpose of facilitating the return of such individuals to independent living. The emergency housing shall provide services and living quarters pursuant to Section 41.3 herein and may be provided as part of a "transitional housing" project.

(g) Hotel. Any building containing six or more guest rooms intended or designed to be used, or which are used, rented or hired out to be occupied or which are occupied for sleeping purposes and dwelling purposes by guests, whether rent is paid in money, goods, or services. It includes motels, as defined in Chapter XII, Part II of the San Francisco Municipal Code (Housing Code), but does not include any jail, health facilities as defined by Section 1250 of the

Health and Safety Code, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of the Health and Safety Code or other institution in which human beings are housed or detained under legal restraint, or any private club and non-profit organization in existence on September 23, 1979, provided, however, that nonprofit organizations which operated a residential hotel on September 23, 1979 shall comply with the provisions of Section 41.8 herein.

(h) Interested Party. A permanent resident of a hotel or his or her authorized representative, or a former tenant of a hotel who vacated a residential unit within the past 90 days preceding the filing of complaint or court proceeding to enforce the provisions of this Chapter. Interested party shall also mean any nonprofit organization, as defined in Section 41.4(k), which has the preservation or improvement of housing as a stated purpose in its articles of incorporation and/or bylaws.

(i) Low-income Household. A household whose income does not exceed 60 percent of the median income for the San Francisco Standard Metropolitan Statistical Area as published by the United States Department of Housing and Urban Development and Housing and Community Development Act of 1974.

(j) Low-income Housing. Residential units whose rent may not exceed 30 percent of the gross monthly income of a low-income household as defined in subsection (i) above.

(k) Nonprofit Organization. An entity exempt from taxation pursuant to Title 26, Section 502 of the United States Code.

(l) Operator. An operator includes the lessee or any person or legal entity whether or not the owner, who is responsible for the day-to-day operation of a residential hotel and to whom a hotel license is issued for a residential hotel.

(m) Owner. Owner includes any person or legal entity holding any ownership interest in a residential hotel.

(n) Permanent Resident. A person who occupies a guest room for at least 32 consecutive days.

(o) Posting or Post. Where posting is required by this Chapter, material shall be posted in a conspicuous location at the front desk in the lobby of the hotel, or if there is no lobby, in the public entrance way. No material posted may be removed by any person except as otherwise provided in this Chapter.

(p) Residential Hotel. Any building or structure which contains a residential unit as defined in (q) below unless exempted pursuant to the provisions of Sections 41.5 or 41.7 below.

(q) Residential Unit. Any guest room as defined in Section 203.7 of Chapter XII, Part II of the San Francisco Municipal Code (Housing Code) which had been occupied by a permanent resident on September 23, 1979. Any guest room constructed subsequent to September 23, 1979 or not occupied by a permanent resident on September 23, 1979 shall not be subject to the provisions of this Chapter, provided, however, if designated as a residential unit pursuant to Section 41.6 of this Chapter or constructed as a replacement unit, such residential units shall be subject to the provisions of this Chapter.

(r) Tourist Hotel. Any building containing six or more guest rooms intended or designated to be used for commercial tourist use by providing accommodations to transient guests on a nightly basis or longer. A tourist hotel shall be considered a commercial use pursuant to City Planning Code Section 216(b) and shall not be defined as group housing permitted in a residential area under City Planning Code Section 209.2.

(s) Tourist Unit. A guest room which was not occupied on September 23, 1979, by a permanent resident or is certified as tourist unit pursuant to Sections 41.6, 41.7 or 41.8 below. Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code.

(t) Transitional Housing. A project which provides housing and supportive services to homeless persons and families or low-income households at risk of becoming homeless which has as its purpose facilitating the movement of homeless individuals or at-risk low-income households to independent living within a reasonable amount of time. The transitional housing shall provide services and living quarters as approved by the Planning Commission that are similar to the residential unit being replaced pursuant to Section 41.13 herein and shall comply with all relevant provisions of City ordinances and regulations. (Added by Ord. 121-90. App. 4/12/90)

SEC. 41.5. APPLICABILITY OF THIS CHAPTER. The provisions of this Chapter shall not apply to:

(a) The change in use of a residential unit where the unit has been found to be unfit for human habitation prior to November 23, 1979 and ordered to be vacated by the Department of Public Health; or

(b) A hotel wherein 95 percent of the guests rooms were tourist units on September 23, 1979; or

(c) A unit which rented for over $1,000 per month on September 23, 1979; or

(d) A hotel in which 95 percent of the total number of guests rooms rented for more than $1,000 per month on September 23, 197; or

(e) A building which was unlawfully converted to a rooming house or hotel in violation of the provisions of the City Planning Code; or

(f) A building which meets the requirements of Section 41.7(c) below for a claim of exemption for partially completed conversions; or

(g) A building which meets the requirements of Section 41.7(b) below for a claim exemption for low-income housing; or

(h) A building which is lawfully approved by the City after September 23, 1979, and is not a replacement unit pursuant to Section 41.3 herein, so long as it is operated by a public entity or non-profit organization as a jail, health facilities as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of Health and Safety Code, or other institution in which human beings are housed or detained under legal restraint. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.6. INITIAL STATUS DETERMINATION. (a) **Filing of Initial Status Determination. Time Limit.** Within 30 calendar days of the mailing date of the summary of the ordinance and the prescribed reporting forms, the owner or operator of each hotel shall file either a statement of exemption, a claim of exemption based on low-income housing, a claim of exemption based on partially completed conversion, or an initial unit usage report as specified below. All filing shall be accompanied by supporting evidence. However, upon application by an owner or operator and upon showing a good cause therefor, the Superintendent of the Bureau of Building Inspection may grant an extension of time not to exceed 30 days for filing. Owner or operator shall post a notice on the day of filing that a copy of the initial status determination document filed with the Superintendent of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

(b) **Filing of Initial Usage Report.** All hotels not covered by the exemptions in Section 41.5, 41.7 or 41.8 must file an initial unit usage report containing the following:

(1) The number of residential and tourist units in the hotel as of September 23, 1979;

(2) The designation by room number and location of the residential units and tourist units as of seven calendar days prior to the date of filing the report;

(3) The total number of residential and tourist rooms in the hotel as of seven calendar days prior to date of filing the report;

(c) **Insufficient Filing.** If the Superintendent of the Bureau of Building Inspection or his designee determines that additional information is needed to make a determination, the Superintendent shall request the additional information in writing. The owner or operator shall furnish the requested information within 15 calendar days upon receipt of the written request. Owner or operator shall immediately post a notice that a copy of the requested information is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday at the Bureau of Building Inspection. If the requested information is not furnished, all the guest rooms not supported by evidence shall be deemed to be residential units.

(d) **Certification of Units.** The Superintendent of the Bureau of Building Inspection shall review the information and accompanying supporting data. A certified copy of hotel tax returns for the calendar year 1979 may be used to establish the number of tourist units and the Superintendent of the Bureau of Building Inspection or the Superintendent's designee may personally inspect units to establish the number of tourist units. If, in the opinion of the Superintendent of Building Inspection, the initial unit usage report is supported by adequate supporting evidence, the Superintendent shall certify the number of residential and tourist units within 90 calendar days of its submission. The owner or operator shall have the burden of proving the number of tourist units claimed by a preponderance of evidence.

Notwithstanding any other provisions in this chapter, if an owner or operator took possession of the hotel operation after September 23, 1979 and before June 15, 1981, and if the owner or

operator can demonstrate that good cause exists why he/she cannot obtain previous evidence from the previous owner or operator to file the initial report, the owner/operator shall base his/her filing on information available to him/her two weeks after he/she took possession of the hotel; any units which are vacant on that date shall be allocated equally between tourist and residential uses, provided that a permanent resident may rebut this presumption by clear and convincing evidence.

After the Superintendent of the Bureau of Building Inspection certifies the number of residential and tourist units, the Superintendent shall issue a certificate of use. The Certificate of Use shall be posted permanently in the lobby or entranceway of the hotel.

(e) **Failure to File Statement of Exemption, Claim of Exemption or Initial Usage Report.** If no initial unit usage report, or statement of exemption, or a claim of exemption based on partially completed conversion, or a claim of exemption based on low-income housing for all of the guest rooms, is filed for a hotel within the time set forth in Section 41.6(a), the Superintendent of Bureau of Building Inspection shall mail a notice to the owner or operator of record by registered or certified mail stating that all the rooms in the hotel shall be deemed residential units unless the owner or operator files unit usage report within 10 calendar days of the mailing date of said notice and that a late filing fee of $50 will be assessed in addition to the fee set forth in Section 41.11 of this Chapter. If the owner or operator fails to submit a unit usage report, within 10 calendar days after notification by the Bureau of Building Inspection, a certificate of use for residential units only shall be issued.

(f) **Appeal of Initial Determination.** An owner or operator may appeal the initial unit status determination by the Superintendent of the Bureau of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (g) below, and further provided that an appeal is filed within 10 calendar days of the mailing of the certification. If an appeal is filed, a copy of the notice

of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.8(b) shall be scheduled.

(g) **Challenge; Standing; Statute of Limitation.** Challenges to the information contained in the initial status determination report filed by the owner or operator may be filed by an interested party in writing provided that it is submitted within 15 calendar days from the date the report to the Bureau of Building Inspection is filed. Upon receipt of a challenge, a hearing shall be held by the Superintendent of the Bureau of Building Inspection or his designee pursuant to the provisions of Section 41.11(b). The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct.

(h) **Reporting Forms for Initial Unit Usage Report.** Compliance by any party or by the City of San Francisco with notice, filing, challenge, designation of unit and certification requirements of ordinance 330-81 regarding the initial status of units shall satisfy similar requirements set forth in this Chapter and all such notices, filings, challenges, designations or certificates shall have the same force and effect as if made pursuant to this subsection. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.7. STATEMENTS OF EXEMPTION; APPLICABILITY OF THIS CHAPTER. (a) **Statement of Exemption Based on Inapplicability of This Chapter.** Any hotel claiming that this Chapter does not apply, under the provisions of Sections 41.5(a) through 41.5(d), shall file a statement of exemption specifying the basis for the exemption. Any hotel claiming exemption under the provisions of Sections 41.5(b) through 41.5(d) shall also state the total number of guest rooms and the number of residential hotel units with monthly rent over $1,000 per month.

(b) **Claim of Exemption Based on Low-Income Housing.** To qualify for a claim of exemption based on low-income housing, the units to be rehabilitated meet the following requirements:

(1) A claim for this exemption has been filed and the requisite fees paid to the Bureau of Building Inspection no later than 60 calendar days after the effective date of this ordinance;

(2) With the exception of ground floor commercial space, the entire building must be completely occupied as low-income housing;

(3) The Superintendent of the Bureau of Building Inspection finds that the proposed elimination of a unit is necessary to comply with Building Code and Housing Code requirements; and

(4) Alternate guest rooms are made available within the building to the displaced permanent residents; or

(5) In those circumstances where it is necessary to relocate a permanent resident off site, the permanent resident shall receive the actual moving expenses and the difference between the rent at the time of relocation and the rent of the temporary housing during the period of rehabilitation.

(6) The owner or operator and successors in interest shall continue to maintain all units in the rehabilitated hotel as low-income housing for 25 years. A deed restriction on such use shall be submitted to the City Attorney's Office for approval. An approved copy of the deed restriction shall be forwarded to the Superintendent of the Bureau of Building Inspection and the original shall be filed with the Recorder by the owner or operator.

(c) **Claim of Exemption Based on Partially Completed Conversion.** A claim of exemption based on partially completed conversion shall not be approved until and unless owner or operator shows that all of the following requirements are met:

(1) An application for partially completed conversion was filed no later than 60 calendar days after the effective date of this ordinance;

(2) The owner or operator has commenced work on extensive Capital Improvements and Rehabilitation Work prior to November 23, 1979, as defined in Section 37.2 of the San Francisco Administrative Code (the San Francisco Rent Stabilization and Arbitration

Ordinance) and has completed such work on at least 35 percent of the units intended to be converted or has expended 40 percent of the total sum budgeted for said work;

(3) The owner or operator or previous owner or operator shall have clearly demonstrated his/her intention to convert all of the residential units in the subject building to tourist use as of November 23, 1979. Satisfactory evidence of intention to convert may be demonstrated by the following factors, including but not limited to:

(A) Whether an architect has been engaged to prepare plans and specifications; or

(B) Whether applications for construction work have been received; or

(C) Whether applications for the necessary permits have been submitted to all relevant city departments; or

(D) Whether a building permit has been issued;

(4) Each permanent resident displaced by the conversion is offered relocation assistance as set forth in Section 41.7(b) below; and

(5) For each vacant residential unit converted, but not occupied by a permanent resident, a sum of $250 per unit not to exceed a total of $10,000 shall be deposited in the San Francisco Residential Hotel Preservation Account of the Repair and Demolition Fund established pursuant to Section 203.1 of the San Francisco Building Code (being Chapter 1, Article 2, Part II of the San Francisco Municipal Code) to be used exclusively for the repair, purchase and rehabilitation of residential hotel units by agencies of the City and County of San Francisco and to be administered by the Department of Public Works.

(d) Consistent with Planning Code Section 183, any unit deemed to be a tourist unit which has remained continuously vacant for three years following the zoning change in a zoning district not allowing tourist hotels shall lose its nonconforming status, and may

be opened only for residential hotel or group housing uses. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.8. REQUIREMENTS FOR NONPROFIT ORGANIZATIONS. (a) **Initial Usage Report.** Within 90 days of the adoption of this amended Chapter, the Bureau of Building Inspection shall notify all nonprofit organizations operating hotels that the nonprofit organization must comply with the Initial Status Determination provisions of Section 41.6 herein.

(b) **Annual Unit Usage Report.** All nonprofit organizations operating hotels with residential units shall comply with the provisions of Section 41.0 herein in the event that the status of the units in the hotel changes from the designation contained in the Initial Unit Usage Report.

(c) **One-for-one Replacement.** If a nonprofit organization seeks to demolish residential units or remove residential units from housing use, or sells or otherwise transfers the building containing residential use, it shall comply with the provisions of Section 41.3 of this Chapter.

(d) **Applicability of this Chapter.** This Chapter shall not apply to a hotel which has a certificate of use for all residential units but contained no permanent residents on September 23, 1979, provided that the hotel is owned, leased, or operated by a nonprofit organization at the time this exemption is sought. The owner, operator or lessee of such a hotel must file with the Superintendent evidence to support such exemption. If the exemption is approved, the Superintendent shall issue a certificate of use designating all the hotel's units as tourist units; provided, however, that the certificate shall not be issued until the hotel owner, operator or lessee has paid any penalties imposed under Section 41.6(e) or Section 41.10(f) or (g), or released any liens imposed under Section 41.20(d). (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.9. RECORDS OF USE. (a) **Daily Log.** Following the effective date of this Chapter each residential hotel shall maintain a daily log containing the status of each room, whether it is occupied or vacant, whether it is used as a residential unit or tourist unit and the name under which the occupant is registered. Each hotel shall also maintain copies of rent receipts showing the amount and period paid for. The daily log shall be available for inspection pursuant to the provision of Section 41.11(c) of this Chapter upon demand by the Superintendent of the Bureau of Building Inspection or the Superintendent's designee between the hours of 9 a.m. and 5 p.m., Monday through Friday unless the Superintendent of the Bureau of Building Inspection and City Attorney reasonably believe that further enforcement efforts are necessary for specified residential hotels, in which case the Bureau of Building Inspection shall notify the hotel owner or operator that the daily logs shall be available for inspection between the hours of 9 a.m. and 7 p.m.

(b) **Weekly Report.** Following the initial determination, an owner or operator of residential units shall post on each Monday before 12 noon the following information:

(1) The number of tourist units to which the owner or operator is currently entitled and the date the certificate of use was last issued;

(2) The number of guest rooms which were used as tourist units each day of the preceding week. Evidence of compliance with requirements imposed hereunder shall be preserved by the owner or operator for a period of not less than two years after each posting is required to be made. The owner or operator shall permit the Superintendent of the Bureau of Building Inspection or his designee to inspect the hotel records and other supporting evidence to determine the accuracy of the information posted. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.10. ANNUAL UNIT USAGE REPORT. (A) Filing. On November 1st of each year every hotel owner or operator subject to this Chapter shall file with the Bureau of Building Inspection an Annual Unit Usage Report containing the following information:

(1) The total number of units in the hotel as of October 15th of the year of filing;

(2) The number of residential and tourist units as of October 15th of the year of filing;

(3) The number of vacant residential units as of October 15th of the year of filing; if more than 50 percent of the units are vacant, explain why;

(4) The average rent for the residential hotel units as of October 15th of the year of filing;

(5) The number of residential units rented by week or month as of October 15th of the year of filing; and

(6) The designation by room number and location of the residential units and tourist units as of October 15th of the year of filing. Owner or operator shall maintain such designated units as tourist or residential units for the following year unless owner or operator notifies in writing the Bureau of Building Inspection of a redesignation of units; owner or operator may redesignate units throughout the year provided they notify the Bureau or Building Inspection in writing by the business day following such redesignation and maintain the proper number of residential and tourist units at all times. The purpose of this provision is to simplify enforcement efforts while providing owner or operator with reasonable and sufficient flexibility in designation and renting of rooms;

(7) The nature of services provided to the permanent residents and whether there has been an increase or decrease in the services so provided;

(8) A copy of the Daily Log, showing the number of units which are residential, tourist or vacant on October 1st, February 1st, May 1st and August 1st of the year of filing.

(b) **Notice of Annual Unit Usage Report.** On the day of filing, the owner or operator shall post a notice that a copy of the Annual Unit Usage Report submitted to the Bureau of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, which notice shall remain posted for 30 days.

(c) **Extension of Time for Filing.** Upon application by an owner or operator and upon showing good cause therefor, the Superintendent of the Bureau of Building Inspection may grant one extension of time not to exceed 30 days for said filing.

(d) **Certificate of Annual Unit Usage Report.** After receipt of a completed Annual Unit Usage Report, the Bureau of Building Inspection shall issue a certified acknowledgement of receipt.

(e) **Renewal of Hotel License and Issuance of New Certificate of Use.** As of the effective date of this Chapter, no hotel license may be issued to any owner or operator of a hotel unless the owner or operator presents with his/her license application a certified acknowledgment of receipt from the Bureau of Building Inspection of the Annual Unit Usage Report for the upcoming year.

(f) **Insufficient Filing; Penalties.** The Superintendent of the Bureau of Building Inspection authorized to assess a penalty as set forth below for insufficient filing, with interest on the penalty accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Superintendent's written notification below.

If the Superintendent or the Superintendent's designee determines that additional information is needed to make a determination, he shall send both the owner and operator a written request to furnish such information within 15 calendar days of the mailing of the written request. The letter shall state that if the requested information is not furnished in the time required, the residential and tourist units shall be presumed to be unchanged from the previous year and that the Superintendent shall impose a $500 penalty for

failure to furnish the additional information within the 15-day period. If the Superintendent does not timely receive the information, the Superintendent shall notify both the owner and operator, by mail, that the Superintendent is imposing a $500 penalty which must be paid within 30 days of the mailing of the notification, and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Failure to File Annual Unit Usage Report; Penalties.** The Superintendent of the Bureau of Building Inspection is authorized to assess penalties as set forth below for failure to file an Annual Unit Usage Report, with interest on penalties accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Superintendent's notification below.

If the owner or operator fails to file an Annual Unit Usage Report, the Superintendent or the Superintendent's designee shall notify the owner and operator by registered or certified mail and shall post a notice informing the owner and operator that unless submission of the Annual Unit Usage Report and application for renewal of the hotel license is made within 15 calendar days of the mailing of the letter, the residential and tourist units shall be presumed to be unchanged from the previous year, and the Superintendent shall impose a penalty of $300 per month of each month the annual report is not filed. If the Superintendent does not receive the report the Superintendent shall notify both the owner and operator, by mail that the Superintendent is imposing the appropriate penalty, as prorated, which must be paid within 30 days of the mailing of the notification and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per

full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(h) **Appeal of Annual Usage Determination.** An owner or operator may appeal the annual unit usage determination by the Superintendent of the Bureau of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (i) below, and further provided that an appeal is filed within 20 calendar days from the date of annual unit usage determination. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provision of Section 41.1(b) shall be scheduled.

(i) **Challenge; Standing; Statute of Limitation.** Any interested party may file a challenge to the information contained in the annual unit usage report filed by the owner or operator provided that such a challenge is in writing and is submitted within 30 calendar days from the date the report to the Bureau of Building Inspection is filed. Upon receipt of a challenge, a hearing pursuant 41.11(b) shall be scheduled. The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.11. ADMINISTRATION (a) **Fees.** The owner or operator shall pay the following filing fees to the Bureau of Building Inspection to cover its costs of investigating the reporting on eligibility. See Section 333.2 Hotel Conversion Fee Schedule, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code) for the applicable fees. The party that brings an unsuccessful challenge to a report pursuant to this Article shall be liable for the change in Section 333.2, Hotel Conversion Fee Schedule. Unsuccessful Challenge, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code). Fees shall be waived for an individual who files an

affidavit under penalty of perjury stating that he or she is an indigent person who cannot pay the filing fee without using money needed for the necessities of life.

SEE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) SECTION 333.2 HOTEL CONVERSION FEE SCHEDULE

(b) **Hearing.** (1) **Notice of Hearing.** Whenever a hearing is required or requested in this Chapter, the Superintendent of the Bureau of Building Inspection shall, within 45 calendar days, notify the owner or operator of the date, time, place and nature of the hearing by registered or certified mail. The Superintendent of the Bureau of Building Inspection shall appoint a hearing officer. Notice of such a hearing shall be posted by the Bureau of Building Inspection. The owner or operator shall state under oath at the hearing that the notice remained posted for at least 10 calendar days prior to the hearing. Said notice shall state that all permanent residents residing in the hotel may appear and testify at the public hearing, provided that the Bureau of Building Inspection is notified of such an intent 72 hours prior to the hearing date.

(2) **Pre-hearing Submission.** No less than three working days prior to any hearing, parties to the hearing shall submit written information to the Bureau of Building Inspection including, but not limited to, the following: the request or complaint, the statement of issues to be determined by the Hearing Officer, and a statement of the evidence upon which the request or complaint is based.

(3) **Hearing Procedure.** If more than one hearing for the same hotel is required, the Superintendent of the Bureau of Building Inspection shall consolidate all of the appeals and challenges into one hearing; however, if a civil action has been filed pursuant to the provisions of Section 41.20(e) of the Chapter, all hearings on administrative complaints of unlawful conversions involving the same hotel shall be abated until such time as final judgment has been

entered in the civil action; an interested party may file a complaint in intervention. The hearing shall be tape recorded. Any party to the appeal may, at his/her own expense, cause the hearing to be recorded by a certified court reporter. The hearing officer is empowered to issue subpoenas upon application of the parties seven calendar days prior to the date of the hearing. During the hearing, evidence and testimony may be presented to the hearing officer. Parties to the hearing may be represented by counsel and have the right to cross-examine witnesses. All testimony shall be given under oath. Written decision and findings shall be rendered by the hearing officer within twenty working days of the hearing. Copies of the findings and decision shall be served upon the parties to the hearing by registered or certified mail. A notice that a copy of the findings and decisions is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday shall be posted by the owner or operator.

(4) **Administrative Review.** Unless otherwise expressly provided in this Chapter, any decision of the hearing officer shall be final unless a valid written appeal is filed with the Board of Permit Appeals within 15 days following the date of the hearing officer's written determination. Such an appeal may be taken by any interested party as defined by Section 41.4(g) herein.

(c) **Inspection.** The Superintendent of the Bureau of Building Inspection shall conduct, from time to time, on-site inspections of the daily logs, other supporting documents and units listed as vacant in the daily logs to determine if owner or operator has complied with the provisions of this Chapter. In addition, the Superintendent of the Bureau of Building Inspection or the Superintendent's designee shall conduct such an inspection as soon as practicable upon the request of a permanent resident of the hotel. If upon such an inspection, the Superintendent or the Superintendent's designee determines that an apparent violation of the provisions of this Chapter has occurred, he/she shall post a notice of apparent violation

informing the permanent residents of the hotel thereof or shall take action as set forth in Section 41.11(d) and (e) below. This notice shall remain posted until the Superintendent of the Bureau of Building Inspection, or the Superintendent's designee, determines that the hotel is no longer in violation of the provisions of this Chapter.

(d) **Criminal Penalties for Violations.** Any person or entity wilfully failing to maintain daily logs as provided in Sections 41.9(a) and (b) of this Chapter, or failing to post materials as provided in Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b)(3), 41.12(b)(10) and 41.18(b) and (c) of this Chapter or wilfully providing false information in the daily logs shall be guilty of an infraction for the first such violation or a misdemeanor for any subsequent violation, and the complaint charging such violation shall specify whether the violation charged is a misdemeanor or an infraction.

If charged as an infraction, the penalty upon conviction therefor shall be not less than $100 or more than $500.

If charged as a misdemeanor, the penalty upon conviction therefor shall be a fine of not less than $500 or more than $1,000 or imprisonment in the county jail not exceeding six months, or both fine and imprisonment.

Every day such violation shall continue shall be considered as a new offense.

For purposes of Section 41.11(d) and (e), violation shall include, but not limited to, intentional disobedience, omission, failure or refusal to comply with any requirement imposed by the aforementioned Sections or with any notice or order of the Superintendent or the Director of Public Works regarding a violation of this Chapter.

(e) **False Information Misdemeanor.** It shall be unlawful for an owner or operator to wilfully provide false information to the Superintendent of the Bureau of Building Inspection or the Superintendent's designees. Any owner or operator who files false

information shall be guilty of a misdemeanor. Conviction of a misdemeanor hereunder shall be punishable by a fine of not more than $500 or by imprisonment in the County Jail for a period not to exceed six months, or by both.

(f) The Superintendent of the Bureau of Building Inspection may impose a penalty of $250 per violation for failure to maintain daily logs as required under Section 41.9 above and for failure to post materials as required under Section 41.9 above and for failure to post materials as required, under Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b) (3), 41.12(b)(10), and 41.18(b) and (c). In order to impose such penalties, the Superintendent shall notify both the owner and operator by certified mail that the Superintendent is imposing the penalty or penalties, which must be paid within 30 days of the mailing of the notification. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Costs of Enforcement.** The proceeds from the filing fees and civil fines assessed shall be used exclusively to cover the costs of investigation and enforcement of this ordinance by the City and County of San Francisco. The Superintendent of the Bureau of Building Inspection shall annually report these costs to the Board of Supervisors and recommend adjustments thereof.

(h) **Inspection of Records.** The Bureau of Building Inspection shall maintain a file for each residential hotel which shall contain copies of all applications, exemptions, permits, reports and decisions filed pursuant to the provision of this Chapter. All documents maintained in said files, except for all tax returns and document specifically exempted from the California Public Record Act, shall be made available for public inspection and copying.

(i) **Promulgation of Rules and Regulations.** The Superintendent of the Bureau of Building Inspection shall propose rules and regulations governing the appointment of an administrative officer

and the administration and enforcement of this Chapter. After reasonable notice and opportunity to submit written comment are given, final rules and regulations shall be promulgated. (Added by Ord. 121-90. App. 4/12/90)

SEC. 41.12. PERMIT TO CONVERT. (a) Any owner or operator, or his/her authorized agent, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversions are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) A description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) The room numbers and location of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and

(9) A statement regarding how one-for-one replacement of the units to converted will be accomplished, including the proposed

location of replacement housing if replacement is to be provided off-site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Bureau of Building Inspection shall send the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfill the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as defined in Section 41.4(b) herein. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.13. ONE-FOR-ONE REPLACEMENT. (a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator 10 calendar days before the hearing; or

(4) Pay to the City and County of San Francisco an amount equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or nonprofit organization, who will use the funds to construct comparable units, an amount at least equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances and regulations, the public entity or nonprofit organization and the housing development proposal of such public entity or nonprofit organization shall be subject to approval by the Mayor's Office of Housing.

(A) Such contribution shall be paid to the approved public entity or nonprofit organization in installments, from an escrow account supervised by the Mayor's Office of Housing, upon application by such public entity or nonprofit organization to the Mayor's Office of Housing, for specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.13(a)(5)(A) above, or provides other form of non-refundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or nonprofit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under Subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2, San Francisco Administrative Code (San Francisco Rent Stabilization and Arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a)(4) or Section 41.13(a)(5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an amount equal to 40 percent of the cost

of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within 90 days following the date that the Bureau of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, 10 days following final action, including any appeals, by the Planning Commission or appellate body, or 10 days following the Department of Real Estate's determination of such amount, whichever occurs latest. In the event that a hotel owner or operator elects to provide one-for-one replacement pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Bureau of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a nonprofit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at 40 percent to the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or nonprofit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an additional 180 days. In the event that a project approved by the Mayor's Office of

Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40-percent in lieu fee to the City pursuant to Section 41.14(a)(4) herein or complied with the requirements of Sections 41.14(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.14(a)(2) or (a)(5) or this subsection, no later than 180 days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be converted into a residential unit regardless of any interim uses after payment as set forth in Subsections 41.13(a)(2) or (a)(5). (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.14. MANDATORY DENIAL OF PERMIT TO CONVERT. A permit to convert shall be denied by Superintendent of the Bureau of Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13 above have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within 12 months previous to the issuance for a permit to convert;

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.15. APPROVAL AND ISSUANCE OF PERMIT TO CONVERT. The Superintendent of the Bureau of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Superintendent of the Bureau of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.16. APPEAL OF DENIAL OR APPROVAL OF PERMIT TO CONVERT. (a) Denial or approval of a permit appli-

cation may be appealed to the Board of Permit Appeals, pursuant to Sections 8 et. seq. Part III of the San Francisco Municipal Code.

(b) The owner or operator shall submit a statement under the penalty of perjury that he has notified all the effected permanent residents of his appeal and of the date, time and place of the hearing before the Board of Permit Appeals, seven calendar days prior to the scheduled hearing.

(c) The appellant shall have the burden of proving that the determination of the Superintendent of the Bureau of Building Inspection is invalid. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.17. RIGHTS OF PERMANENT RESIDENTS. (a) To apply for a permit to convert, an owner or operator of the hotel shall do the following:

(1) Any interested community organization and all permanent residents residing in said building at the time of an application for a permit to convert and thereafter shall be timely informed of all public hearings and administrative decisions concerning said conversions; said notice shall be posted by the owner or operator;

(2) A permanent resident has the right to occupy his/her residential unit for 60 calendar days from the issuance of the permit to convert;

(3) Owner or operator shall offer a permanent resident available comparable units in the building or to any replacement housing provided pursuant to Subsection 41.13(a)(1) or (2);

(4) All displaced permanent residents are entitled to relocation assistance as provided for in subsection (b) below;

(5) Seven calendar days prior to the filing of an application for a permit to convert, the owner or operator shall notify, in writing, by personal service, or registered, or certified mail, every permanent resident affected by the proposed conversion of his/her intent to convert designated units;

(6) The notification required by Subsection (5) above shall also inform the permanent residents of their rights under Subsections (1) through (4) above.

(b) **Relocation Assistance.**

(1) A permanent resident, who as a result of the conversion of his/her unit must relocate off site, shall be reimbursed the actual moving expenses not to exceed $300 or may consent to be moved by the owner or operator.

(2) A displaced permanent resident shall have the right of first refusal for the rental or leasing of replacement units, if any, provided pursuant to the provisions of Sections 41.13(a)(1) or 41.13(a)(2).

(3) A permanent resident displaced by partially completed conversion under the provisions of Section 41.7(c) shall be entitled to a displacement allowance of $1,000 per displaced person. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.8. DEMOLITION. (a) This section shall apply only to demolition of residential hotel buildings pursuant to an abatement order of the Director of Public Works or the Superior Court of the State of California, or demolition necessitated by major fires, natural causes or accidents where the cost of repair exceeds 50 percent of the replacement value of the building.

(b) Upon submission of an application for a demolition permit, the owner or operator shall post a copy of said application.

(c) Upon notification by the Central Permit Bureau that a demolition permit has been issued,the owner or operator shall post a notice explaining the procedure for challenging the issuance of the demolition permit to the Board of Appeals.

(d) When issued a demolition permit, the owner or operator shall provide a written notice of the demolition within 10 calendar days of issuance of the permit to each residential permanent resident. Each permanent resident shall be notified in writing of

his/her rights to relocation assistance and to occupy the same unit for a period of up to 60 days after issuance of the demolition permit.

(e) The subsequent issuance of a building permit for construction on the demolition site shall be conditioned on the owner or operator's agreement to replace, on a one-for-one basis, the demolished residential units as required by the provisions of Section 41.13. No building permit shall be issued until owner or operator complies with the provisions of Section 41.13.

(f) The conditions for issuance of a demolition permit set forth in subsection (e) above shall be recorded by the owner at the time of issuance of the demolition permit in order to provide notice of said conditions to all subsequent purchasers and interested parties. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.19. TEMPORARY CHANGE OF OCCUPANCY.

(a) Temporary Change of Occupancy.

(1) A tourist unit may be rented to a permanent resident, until voluntary vacation of that unit by the permanent resident or upon eviction for cause, without changing the legal status of that unit as a tourist unit.

(2) A residential unit which is vacant at any time during the period commencing on May 1st and ending on September 30th annually may be rented as a tourist unit provided that (i) the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction for cause after the permanent resident was accorded all the rights guaranteed by State and local laws during his/her tenancy, (ii) the daily log shows that the residential unit was legally occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, unless owner or operator can produce evidence to the Bureau of Building Inspection explaining such vacancy to the satisfaction of the Bureau of Building Inspection, including but not limited to such factors as repair or rehabilitation work performed in

the unit or good faith efforts to rent the unit at fair market value, and (iii) the residential unit shall immediately revert to residential use upon application of a prospective permanent resident.

25-Percent Limit.

However, at no time during the period commencing on May 1st and ending on September 30th may an owner or operator rent for nonresidential use or tourist use more than 25 percent of the hotel's total residential units unless the owner or operator can demonstrate that (i) the requirements of 41.19(a)(2) herein are met, (ii) good faith efforts were made to rent such units to prospective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request. Owners or operators who seek to exceed this limit must request a hearing pursuant to Section 41.11(b) above and the decision whether to permit owners or operators to exceed this limit is within the discretion of the hearing officer.

(b) **Special Requirements for Hearings on Tourist Season Rental of Residential Units.** Where an owner or operator seeks a hearing in order to exceed the limit on tourist season rental of vacant residential units pursuant to Section 41.19(a)(2), the requirements of 41.11(b)(1), (b)(3) above shall be applicable except as specially modified or enlarged herein;

(1) **Notice of Hearing.** Notice of hearing as provided in Section 41.11(b)(1) above shall be given within 15 calendar days. The notice requirements for the owner or operator shall also be applicable to any interested party who has submitted a prior written request to the Superintendent to be notified of such hearings.

(2) **Time of Hearing**. The hearing shall be held within 30 days of the submission of the owner or operator's written request for hearing.

(3) **Burden of Proof.** Burden of proof is on the owner or operator.

(4) **Interested Party.** Any interested party shall be deemed a "party to the hearing" for purposes of Section 41.11(b)(1).

(5) **Determination of the Hearing Officer.** Based upon the evidence presented at the hearing conducted in accordance with Section 41.11(b)(3) above, the hearing officer shall make findings as to (i) whether the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction, (ii) whether the residential unit was occupied for at least 50 percent of the period commencing on October and ending on April 30th of the previous year, (iii) whether the owner or operator has committed unlawful action under this Chapter within 12 months prior to this request, and (iv) whether the owner or operator made good faith efforts to rent vacant residential units to prospective permanent residents at no more than fair market value for a comparable unit during the tourist season and yet was unable to secure such rentals. Good faith efforts shall include but not be limited to, advertising the availability of the residential units to the public. In determining fair market value of the residential units, the hearing officer shall consider any data on rental of comparable units, as defined in Section 41.4(b) herein.

(6) **Decision**. The hearing officer shall render a written decision and findings within 10 working days of the hearing.

(7) **Effect of Decision.** The hearing officer's decision shall remain in effect for the tourist season for which the owner or operator requested the hearing. If the owner or operator wishes to exceed the 25 percent limit during any subsequent tourist season, a new written request for hearing must be submitted to the Superintendent of the Bureau of Building Inspection.

(8) **Construction.** The purpose of this Section 41.19(b) is to supplement or modify provisions of Section 41.11(b)(1) through (b)(3). Unless otherwise specifically modified, all provisions of Sections 41.11(b)(1) through (b)(3) are deemed applicable to

hearings concerning the tourist season limitations on rental of vacant residential units.

(c) **Winter Rentals**. A residential unit which is vacant at any time during the period commencing on October 1 and ending on April 30th annually may be rented as a tourist unit provided that:

(1) Such owner or operator has been permitted to rent residential units as tourist units in excess of 25 percent of the residential units pursuant to Section 41.19(a)(2) above;

(2) The owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to the time of this request;

(3) A residential hotel may not rent in excess of 33 percent of the total number of residential units or 20 residential units, whichever is less, pursuant to this subsection;

(4) Applicants to temporarily convert residential units pursuant to this subsection shall submit applications to the Department of Public Works, in accordance with rules and regulations promulgated by the Department of Public Works;

(5) A maximum of 60 residential units may be approved per year to be rented as tourist units or nonresidential units pursuant to this subsection 41.19(c). In the event that the number of such applications exceeds 60 residential units, the Department of Public Works shall establish a lottery system based on priority ranking where preference shall be accorded to residential hotel owners who have been eligible more frequently than other hotel owners for temporary conversion pursuant to Subsection 41.19(a)(2) above;

(6) Such nonresidential use is permitted by the zoning for such residential hotel; and

(7) No application for such temporary conversion shall be approved by the Department of Public Works to fill the unused portion of the 60 residential unit limitation for the previous year. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES. (a) Unlawful Actions. It shall be unlawful to:

(1) Change the use of, or eliminate a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter.

(3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter.

(b) **Hearing for Complaints of Unlawful Conversions.** Upon the filing of a complaint by an interested party that an unlawful conversion has occurred and payment of the required fee, the Superintendent of the Bureau of Building Inspection shall schedule a hearing pursuant to the provisions of Section 41.11(b). The complainant shall bear the burden of proving that a unit has been unlawfully converted. The hearing officer shall consider, among others, the following factors in determining whether a conversion has occurred:

(1) Shortening of the term of an existing tenancy without the prior approval of the permanent resident;

(2) Reduction of the basic services provided to a residential unit intended to lead to conversion. For the purpose of this section, basic services are defined as access to common areas and facilities, food service, housekeeping services and security;

(3) Repeated failure to comply with the order of the Bureau of Building Inspection or the Department of the Public Health to correct code violations with intent to cause the permanent residents to voluntarily vacate the premises;

(4) Repeated citations by the Superintendent of the Bureau of Building Inspection or the Department of Public Health of code violations;

(5) Offer of the residential units for nonresidential use or tourist use except as permitted in this Chapter;

(6) Eviction or attempts to evict a permanent resident from a residential hotel on grounds other than those specified in Sections 37.9(a)(1) through 37.9(a)(8) of the San Francisco Administrative Code except where a permit to convert has been issued.

(7) Repeated posting by the Superintendent of the Bureau of Building Inspection of notices of apparent violations of this Chapter pursuant to Section 41.11(c) above.

(c) **Civil Penalties.** Where the hearing officer finds that an unlawful conversion has occurred, the Superintendent shall impose a civil penalty of three times the daily rate per day for each unlawfully converted unit from the day the complaint is filed until such time as the unit reverts to its authorized use. The daily rate shall be the rate unlawfully charged by the hotel owner or operator to the occupants of the unlawfully converted unit. The Superintendent may also impose penalties upon the owner or operator of the hotel to reimburse City or complainant for the costs of enforcement, including reasonable attorneys' fees, of this Chapter. The hearing officer's decision shall notify the parties of this penalty provision and shall state that the Superintendent of the Bureau of Building Inspection is authorized to impose the appropriate penalty by written notification to both the owner and operator, requesting payment within 30 days. If the penalty imposed is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(d) **Lien Proceedings**

(1) **Preparation of Delinquency Report.** If any penalty imposed pursuant to Sections 41.10(d), 41.10(f), 41.11(f) or 41.20(c) is not received within the required time period, the Superintendent of the Bureau of Building Inspection shall initiate proceedings to make the penalty, plus accrued interest, a special assessment lien against the real property regulated under this Chapter. The Superin-

tendent shall prepare a delinquency report for the Board of Supervisors. For each delinquent account, the report shall contain the owner's name, the amount due, including interest, and a description of the real property. The report shall also indicate which of the delinquent amounts should be exempted from the lien procedure because of the small amounts involved, or because another debt collection procedure is more appropriate. The descriptions of the parcels shall be those used for the same parcels in the Assessor's map books for the current year.

(2) **Notice.** Five days prior to forwarding the delinquency report to the Board of Supervisors, the Superintendent shall mail a copy of the report to any affected owner and shall post the report at the affected properties. Upon receipt of the report, the Board of Supervisors shall fix a time, date and place for hearing the report and any protest or objections thereto, and shall mail notice of the hearing to each owner of real property described in the report not less than 10 days prior to the date of hearing.

(3) **Hearing and Confirmation.** The Board of Supervisors shall hear the report with opportunity for any protests or objections of the owners of the real property liable to be assessed for delinquent accounts. The Board may make such revisions, corrections, or modifications of the report as it may deem just, after which, by motion or resolution, it shall be confirmed. The Board's decision on the report on all protests or objections thereto, shall be final and conclusive, provided, however, that any delinquent account may be removed from the report by payment in full at any time prior to confirmation of the report. The Clerk of the Board shall cause the confirmed report to be verified in form sufficient to meet recording requirements.

(4) **Collection of Assessment.** Upon confirmation of the report by the Board, the delinquent charges contained herein shall constitute a special assessment against the property listed in the report. Each such assessment shall be subordinate to all existing special liens

previously imposed upon such property and paramount to all other liens except those for state, county, and municipal taxes with which it shall be in parity. The lien shall continue until the assessment and all interest due and payable thereon are paid. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to said special assessment.

(5) **Recordation; Charges.** The Clerk of the Board shall cause the confirmed and verified report to be recorded in the County Recorder's Office within 10 days of its confirmation. The special assessment lien on each parcel of property described in said report shall carry additional charges for administrative expenses of $100 or 10 percent of the amount of the unpaid balance, including interest, whichever is higher.

(6) **Filing with Controller and Tax Collector: Distribution of Proceeds.** After the report is recorded, the Clerk of the Board shall file a certified copy with the Controller and Tax Collector, whereupon it shall be the duty of said officers to add the amount of said assessment to the next regular bill for taxes levied against said parcel or parcels of land for municipal purposes, and thereafter said amount shall be collected at the same time and in the same manner as ordinary City and County taxes are collected, and shall be subject to the same penalties and the same procedure under foreclosure and sale in case of delinquency as provided for property taxes of the City and County of San Francisco. Except for the release of lien recording fee authorized in Subsection (7) below, all sums collected by the Tax Collector pursuant to this section shall be held in trust by the Treasurer and distributed as provided in Section 41.8(e) of this Chapter.

(7) **Release of Lien; Recording Fee.** Upon payment to the Tax Collector of the special assessment, the Tax Collector shall cause a Release Lien to be recorded with the County Recorder and from the sum collected pursuant to Subsection (6) above, shall pay to the County Recorder a recording fee of $6.00.

(e) **Civil Action**. An interested party may institute a civil proceeding for injunctive relief and damages. The Superintendent of the Bureau of Building Inspection may institute a civil proceeding for injunctive relief. Counsel for the interested party shall notify the City Attorney's office of the City and County of San Francisco of any action filed pursuant to this section. In determining whether an unlawful conversion has occurred, the court may consider, among other factor, those enumerated in Section 41.20(b) of this Chapter. The interested party instituting civil proceeding, or the City suing to enforce this Chapter, if prevailing parties, shall be entitled to the costs of enforcing this Chapter, including reasonable attorney's fees, pursuant to an order of the Court. (Added by Ord. 121-90, App. 9/12/90)

SEC. 41.21. ANNUAL REVIEW OF RESIDENTIAL HOTEL STATUS. (a) The Bureau of Building Inspection shall prepare and submit to the Board of Supervisors an annual status report containing the following:

(1) Current data on the number of residential hotels and the number of residential units in each of the residential hotels in the City and County of San Francisco, including, to the extent feasible, information regarding rents, services provided, and violations of the City's codes;

(2) Current data on the number of residential hotel units covered pursuant to a permit to convert;

(3) Current data on the number of hotels units demolished or eliminated due to code abatement proceedings and fire;

(4) Current data on the number of hotel units illegally converted;

(5) Current data on the number of replacement housing units rehabilitated or constructed;

(6) A summary of the enforcement efforts by all City agencies responsible for the administration of this Chapter; and

(7) An evaluation of the workability and effectiveness of the permitted temporary change of occupancy procedures and winter rentals in Section 41.19 herein; and

(8) A report on expenditures from the San Francisco Residential Hotel Preservation Fund Account.

(b) The Economic and Social Policy Committee of the Board of Supervisors shall conduct a hearing on the annual report submitted by the Bureau of Building Inspection and shall recommend appropriate actions to be taken by the Board of Supervisors.

(c) The Bureau of Building Inspection should establish a San Francisco Residential Hotel Operators Advisory Committee composed of:

-3 members nominated by the San Francisco Hotel Association (for-profit operators);

-3 members nominated by the Golden Gate Hotel Association (for-profit operators);

-2 members nominated by the Council of Community Housing Organization (nonprofit hotel operators)

-Deputy Mayor of Housing

The committee shall meet no less than once every three months to advise the Mayor's Office of Housing on matters including, but not limited to:

(1) Proposed revisions to this ordinance;

(2) Programs that various City agencies (i.e. Mayor's Office of Housing, Department of Social Services, etc.) should develop to assist the City's residential hotel operators;

(3) Any state or federal laws the City should support, oppose, or seek to revise that impact residential hotel owners;

(4) Any new City, State, or Federal programs the City shall encourage that would provide financial or technical support or assistance to San Francisco Residential Hotel Operators. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.22 CONSTRUCTION. (a) Nothing in this Chapter may be construed to supersede any other lawfully enacted ordinance of the City and County of San Francisco, except that definitions provided in this Chapter shall govern the enforcement of this Chapter.

(b) Clauses of this Chapter are declared to be severable and if any provision or clause of this Chapter or the application thereof is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions of this Chapter. (Added by Ord. 121-90, App. 4/12/90)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 4-1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ADAM SPARKS,	)	No. 91-15961
	)	
Petitioner-Appellant,	)	DC No.
	)	CV 91-01859 JPV
v.	)	
	)	
CITY AND COUNTY OF SAN FRANCISCO,	)	MEMORANDUM *
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued October 9, 1991
Submission Deferred October 10, 1991
Submitted February 12, 1992
San Francisco, California

Before: **PREGERSON, FERGUSON,** and **O'SCANNLAIN,** Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

Adam Sparks was held in contempt of court for violating a preliminary injunction ordering him to comply with an ordinance of the City and County of San Francisco (the "City"). After California state court review, he was sentenced to six days in jail and a $3,000 fine. The City obtained an order of commitment and Sparks filed a petition for writ of habeas corpus in federal district court. He now appeals the dismissal of his petition and challenges the constitutionality of the ordinance and the alleged violation of his Sixth Amendment right to a jury trial.

I

Sparks satisfies the "in custody" requirement of 28 U.S.C. § 2254(a) even though his term of imprisonment has yet to begin. Maleng v. Cook, 109 S.Ct. 1923, 1926 (1989). Furthermore, his appeal is ripe because he has exhausted his state remedies and presents this court with questions of state imprisonment "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a), (b). We apply federal and not state law. Id.; Glen v. Hongisto, 438 F.Supp. 10, 16 n.10 (N.D.Cal. 1977).

Our review of Sparks' first contention is controlled by Walker v. City of Birmingham, 388 U.S. 307 (1967),[1] and a long line of Supreme Court precedent. In Walker, the Court held that the petitioners had to obey a legally issued injunction and could not contest the underlying constitutionality of the ordinance by disobeying the injunction. Walker, 388 U.S. at 321.

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[1] Thomas v. Collins, 323 U.S. 516 (1945), reaches the opposite result in an analogous situation. However, Walker was decided later in time thus impliedly modifying Thomas, and Walker is cited by the Supreme Court and the Ninth Circuit as the controlling precedent in similar situations.

> An injunction duly issuing out of a court of general jurisdiction ... must be obeyed ... however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Walker, 388 U.S. at 314 (quoting Howat v. Kansas, 258 U.S. 181, 189-90 (1922)).

The Court further stated "that in the fair administration of justice no man can be judge in his own case, ... respect for judicial process is a small price to pay for the civilizing hand of law." Walker, 388 U.S. at 320-21. Walker hinted that there might be some relaxation of this strict rule of enforcement "where the injunction was transparently invalid or had only a frivolous pretense to validity." Id. at 315. However, this is not the case regarding the injunction ordering Sparks to obey the ordinance.[2]

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[2] Sparks did not raise this issue, but if he had been guilty of civil contempt he would be allowed to question the invalidity of the ordinance as a defense. In Re Establishment Inspection of Hern Iron Works, 881 F.2d 722, 726 n.11 (9th Cir. 1989); Scott & Fetzer Co. v. Dile, 643 F.2d 670, 675 (9th Cir. 1981). Although Sparks was held in contempt under a civil statute that designation is not controlling. This court looks instead "to the substance of the order." Union of Professional Airmen v. Alaska Aeronautical Indus., Inc., 625 F.2d 881, 883 (9th Cir. 1980) (citing Shillitani v. United States, 384 U.S. 364, 369 (1966)). Sparks' proceeding and judgment fit the definition of criminal contempt.

"Criminal contempt is a completed act of disobedience; the sentence is punitive to vindicate the authority of the court." In Re Sequoia Auto

The Supreme Court has consistently reaffirmed Walker and its rationale. The Court has stated that "disobedience of such an outstanding order of a federal court subjects the violator to contempt even though his constitutional claim might later be upheld." Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439 (1976) (citing Walker). See also GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) ("persons subject to an injunctive order ... are expected to obey ... even if they have proper grounds to object to the order"); Maness v. Meyers, 419 U.S. 449, 458 (1975) ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

This circuit also relies on Walker in rejecting claims to review the underlying constitutionality of court orders leading to contempt orders. See, e.g., In Re Establishment Inspection of Hern Iron Works, 881 F.2d 722 (9th Cir. 1989). In Hern Iron Works, a petitioner challenged a contempt order because it was based upon an invalid administrative search warrant and therefore, he argued, it could not be enforced. However, we allowed the "judicial order to be enforce through criminal

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Brokers, Inc., 827 F.2d 1281, 1283 n.1 (9th Cir. 1987). The fine and jail sentence imposed on Sparks were not remedial measures to coax compliance, but were punitive measures designed to punish Sparks for intentionally disobeying the court's injunction, and to enforce the authority of the court. Scott & Fetzer, 643 F.2d at 675 n.7; United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).

The fine and jail sentence were not imposed to compensate the City. The sentence would not end with the court proceeding but was unconditional and meant to punish Sparks. "A contempt judgment is criminal when it requires the contemnor to pay the government an unconditional fine." Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 779 (9th Cir. 1983). "The primary purpose of criminal contempt is to punish past defiance of a court's judicial authority, thereby vindicating the court." Id. at 778. The reasonable doubt standard used by the California Superior Court is also the proper standard for criminal contempt. Id. at 777 n.1.

contempt even though the underlying decision may be incorrect and even unconstitutional." Id. at 725. In relying on Walker, we recognized that "the Supreme Court came down on the side of the orderly rule of law." Id. at 726.

Hence, Sparks does not possess a constitutional right to disobey a properly entered court order. The preliminary injunction granted against him was reviewed by the California courts and Sparks repeatedly failed to comply with the court order that he obey the ordinance. Walker is the controlling precedent in this matter. It requires obedience to a court order regardless of the constitutionality of the law underlying it when a petitioner had effective review of that order in state court, as did Sparks. United States v. Ryan, 402 U.S. 530, 532 n.4 (1971). We conclude that state imprisonment of Sparks for contempt for willfully violating the state court injunction violates neither the federal Constitution nor any federal law. We affirm the denial of his writ of habeas corpus.

II

Sparks contends he was denied his Sixth Amendment right to a jury trial on the contempt violations. The focus of our review is upon "the constitutional legitimacy of [Sparks'] sentence as that sentence stands today after review by and exhaustion of the state court process. The only question for this court is whether the final state result violates constitutional law so as to warrant granting a writ of habeas corpus." Richmond v. Lewis, 921 F.2d 933, 944 (9th Cir. 1990), amended, 948 F.2d 1473 (9th Cir. 1991), petition for cert. filed, 60 U.S.L.W. ___ (U.S. Jan 15, 1992) (No. 91-7094) (citing Walton v. Arizona, 110 S. Ct. 3047, 3057-58 (1990)).

Under collateral review, such as in this appeal, we recognize the Court's direction to afford "even greater deference ... to the state system than the Court had urged in Walton, which it had heard on direct review." Richmond, 921 F.2d at 944. "In short, this court's focus must not be on the underlying

sentence but on whether the state system in both imposing and reviewing that sentence committed an independent constitutional violation." Id. at 945.

Our focus, then, is upon Sparks' sentence of six days in jail and the $3,000 fine resulting from the California Court of Appeal's affirmance of six counts of contempt. We conclude this sentence does not exceed the limits that Congress and the Supreme Court have used to delineate a serious offense which constitutionally requires a trial by jury.

In Blanton v. City of North Las Vegas, 109 S. Ct. 1289 (1989), the Court again affirmed that a sentence of six months or less is not a serious offense requiring a jury trial. Id. at 1292-93.[3] The Court also accepted a $5,000 fine limit, the maximum selected by Congress for petty offenses, 18 U.S.C. §§ 3559, 3571(b)(6)-(7), as dividing a serious offense from a petty offense not requiring a jury trial. Blanton, 109 S. Ct. at 1294 & n.11. Consequently, Sparks' six day jail sentence and $3,000 fine does not implicate the Sixth Amendment right to a jury trial in a review of the California Court of Appeal's decision.[4]

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[3] Accord Taylor v. Hayes, 418 U.S. 488 (1974) (when consecutive sentences on nine counts of contempt were imposed totalling over four years of imprisonment but later the Kentucky Court of Appeals ordered them served concurrently, leaving the petitioner with only one six month sentence, the U.S. Supreme Court held that petitioner's jury trial right was not violated "when the penalty actually imposed does not exceed six months." Id. at 495.).

[4] Rife v. Godbehere, 814 F.2d 563 (9th Cir.), amended, 825 F.2d 185 (9th Cir. 1987) is not contra to our decision. There, the state court system "remedied" the lack of a jury trial by reducing the defendant's sentence to six months. However, applying the then applicable Ninth Circuit law, we affirmed the district court grant of habeas corpus because the fine was over the $500 limit thought to delineate a serious offense requiring jury trial. id. at 565. Now, however, Congress and the Supreme Court define that limit as $5,000. 18 U.S.C. §§ 3559, 3571(6)-(7); Blanton, 109 S.Ct. at 1294. The Rife court recognized this new $5,000 limit in its amendment of the original opinion. 825 F.2d at 185.

III

In view of the controlling case law and the foregoing discussion, we affirm the dismissal of Sparks' habeas petition.

-AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 26-1992
CATHY A. CATTERSON
U.S. COURT OF APPEALS

ADAM SPARKS,	)	No. 91-15961
	)	
Petitioner-Appellant,	)	DC No.
v.	)	CV-91-1859-JPV
	)	
CITY AND COUNTY OF SAN FRANCISCO,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	
	)	

Before: PREGERSON, FERGUSON, and O'SCANNLAIN, Circuit Judges.

Appellee shall respond to the petition for rehearing and the suggestion for rehearing en banc within fourteen days of the filing of this order. The response shall address the constitutional propriety of a retroactive cure of the right to a jury trial when that principle was allegedly violated at the state trial court level.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 27, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ADAM SPARKS,	)	No. 91-15961
	)	
Petitioner-Appellant,	)	DC No.
v.	)	CV-91-1859-JPV
	)	
CITY AND COUNTY	)	
OF SAN FRANCISCO,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	
	)	

Before: PREGERSON, FERGUSON, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT

FILED
APR 10 1991
Robert Wandruff Clerk
BY DEPUTY

No. SO19797 (AO47823)

ADAM SPARKS,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

CITY AND COUNTY OF SAN FRANCISCO,

Real Party in Interest.

Petition for review DENIED.

LUCAS
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

FILED
FEB 11, 1991
Court of Appeal-First App. Dist.
RON D. BARROW
By Deputy

SPARKS, ADAM
VS.
ON HABEAS CORPUS
A047823 OLD NO. A045150
SAN FRANCISCO COUNTY NO. 885533

BY THE COURT:

The petition for rehearing is denied.

DATED: FEB 11 1991

ANDERSON, P.J.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

ADAM SPARKS, et al.,	FILED
	JAN 22, 1991
Petitioners,	Court of Appeal-First App. Dist.
	RON D. BARROW
v.	By Deputy
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	No. AO45150 No. AO47823
Respondent,	(San Francisco Sup.Ct.No.885533)
CITY AND COUNTY OF SAN FRANCISCO,	
Real Party in Interest.	

Petitioners Adam Sparks and Pacific Bay Inn, Inc., own and operate a hotel which real party in interest City and County of San Francisco (City) asserts is governed by its Residential Hotel Unit Conversion and Demolition Ordinance (S.F. City Admin. Code, ch. 41). The fundamental feature of this ordinance is its distinction between residential units (which are heavily regulated) and tourist units (which are

largely left unregulated). Petitioners' hotel has 84 rooms, 69 of which are classified as residential. Subsequent to the rebuilding of their hotel in the wake of a fire, petitioners have taken the position that the ordinance has no application to their hotel and cannot hinder them from letting all 84 rooms as tourist units.

In April of 1988 respondent court entered a preliminary injunction by which petitioners were ordered (1) not to rent more than a certain number of units for tourist use; (2) to comply with specified record and notice provisions of the ordinance; and (3) to allow administrative inspection "with two hours notice, no more than three times each month" and "to surrender all hotel registration records, room receipts, and other relevant documents at each such inspection and to allow the housing inspectors to make a room by room inspection of the premises at each such inspection."[1]

Persuaded by the City's application that petitioners were not in compliance with the injunction, respondent court issued an order to show cause why petitioners should not be held in contempt. In their response petitioners submitted that the violations were not nearly as numerous as alleged and were largely accidental. In February of 1989 respondent court conducted a hearing on the order, found 32 "separate violations,"[2] and ordered that petitioner Sparks pay $8,000 ($250

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[1]The injunction is the subject of an appeal by petitioners currently pending in this court (*City and County of San Francisco v. Pacific Bay Inn, Inc.*, A041905).

[2]Two of the "violations" were for "failure to allow inspection"; five were for failures to provide records (presumably to administrative inspectors) and to post notices; and 25 were for "resident rooms rented to tourists." The violations occurred on one day in September of 1988 and two days in October of that year.

for each violation) and be imprisoned for one day in the county jail for each violation. Upon petitioners' application filed in conjunction with their petition for extraordinary relief in AO45150, we stayed enforcement of the contempt order later that month.

The process was repeated again in 1989. This time, following an unreported hearing, respondent court found both petitioners guilty of 178 acts of contempt.[3] In November of that year respondent court ordered petitioner Sparks to pay $89,000 ($500 for each violation) and be imprisoned for 178 days in the county jail, this term of imprisonment to be served consecutively to the previous term of 32 days. Once again, we stayed enforcement of the contempt order when petitioners invoked our original jurisdiction in AO47823.

REVIEW

I

Each of the petitions filed herein prays for issuance of writs of habeas corpus and certiorari. "Although an order made in a contempt proceeding is not appealable [citations], it may be reviewed by certiorari or, where appropriate, by habeas corpus [citations]." (*In re Buckley*, (1973) 10 Cal.3d 237, 259.) Petitioner Sparks can apply for relief in habeas corpus because he faces punishment by incarceration; petitioner Pacific Bay Inn, Inc. is not entitled to seek that

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[3]As recited in the subsequent formal order of contempt, the violations occurred on one day in May of 1989, eight days in August, and one day in September of that year. Only one of the violations was for "failure to allow inspection." Five related to records and notices. The remaining 172 violations were for "resident rooms rented to tourists."

remedy because it does not confront imprisonment or fines. (See *In re Coleman*, (1974) 12 Cal.3d 568, 572, fn. 2; *Lloyd v. Superior Court* (1982) 133 Cal.App.3d 896, 899, fn. 1.) Why a corporation feels the need for vindication in these circumstances is not readily apparent. Nevertheless, petitioners' mutual desire in this respect will be accommodated by treating the petitions as seeking certiorari alone. The point is largely academic, given that "[t]he scope of review upon an application for a writ of habeas corpus is identical to that by way of a writ of certiorari...." (*In re Karpf* (1970) 10 Cal.App.3d 355, 364.) Our Supreme Court has made it clear just how limited is that review: "In reviewing an adjudication of contempt, 'the sole question before us is one of jurisdiction of the trial court to render the judgment under review, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the jurisdiction of the trial court.' [Citations.] More recently we said that the responsibility of the reviewing court is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.'" (*In re Buckley, supra,* at p. 247.)

In light of the wide-ranging nature of the deficiencies which petitioners perceive in the orders, it is appropriate to begin with some general principles governing contempt.

In its legal sense, contempt has been defined as "a disobedience of court by acting in opposition to its authority, justice or dignity...." (*Raskin v. Superior Court* (1934) 138 Cal.App. 668, 670.) Its manifestations come within two classifications. "Direct contempt is that committed in the immediate view and presence of the court or of the judge at

chambers; all other contempts are indirect[,] which by definition occur outside the presence of the court." (*Nierenberg v. Superior Court* (1976) 59 Cal.App.3d 611, 616.) Indirect contempts, such as those found to have been committed by petitioners, can be charged and punished under either the Penal Code (Pen. Code, § 166, subds. 4, 5) or the Code of Civil Procedure (Code Civ. Proc., § 1209, subd. (a)(5).) "A proceeding for punishment of indirect contempt is commenced by an affidavit which is in effect a complaint; this 'frames the issues before the court and is a jurisdictional prerequisite to the court's power to punish....'" (*Rosenstock v. Municipal Court* (1976) 61 Cal.App.3d 1, 7-8; see Code Civ. Proc. § 1211.)

II

Petitioners begin their attack on the orders with two general arguments, each of which they see as adequate to kill the contempt proceedings at the outset. First, they focus on the constitutionality of the ordinance. California permits attack on contempt orders based on purported violation of statutes or prior orders that are unconstitutional on their face. (See *In re Misener* (1985) 38 Cal.3d 543 [statute]; *In re Berry* (1968) 68 Cal.2d 137, 147-148 [court order].) Although petitioners do not press such an attack against the injunction, they do contend that the ordinance fails the test of constitutionality. Petitioners are incorrect. (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1088-1089; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 907-912.)

III

Petitioners' second general prong concerns the character of the preliminary injunction. Petitioners see it as mandatory, and thus automatically stayed when they perfected their appeal. The City is equally adamant that the injunction was prohibitory and thus not stayed. A review of the authorities cited by both sides and of the equally persuasive arguments they marshal, demonstrates just how difficult it may be to classify an injunction. What petitioners view as mandatory aspects of the injunction ordering them to comply with the ordinance, are just as easily seen by the City as prohibitions against petitioners continuing to disobey the ordinance. Rather than undertake to pin our own tag on the injunction, we are inclined to defer to respondent court's opinion of its own order as prohibitory. Respondent is the best authority of what it intended, and we will defer to its characterization.

IV

Petitioners cannot prevail on their contention that their due process rights of notice at the first contempt proceeding were violated because they "were misinformed as to the nature of the charges against them, by the City's Memorandum of Points and Authorities ..., which indicated that the City sought a jail term not to exceed five days. The contempt proceedings against petitioners were founded upon the Code of Civil Procedure, which provides that if a person is found "guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ..., or he or she may be imprisoned not exceeding five days, or both." (Code Civ. Proc., § 1218.) In the specified memorandum the City requested "an order of the Court adjudging PACIFIC

BAY INN and ADAM SPARKS to be guilty of contempt and punished therefore by imprisonment in the county jail for not more than five days, and fined $1,000 for each of the thirty-two violations...." As previously mentioned, the relevant accusatory document is the City's affidavit (see *Rosenstock v. Municipal Court, supra,* 61 Cal.App.3d 1 at pp. 7-8) wherein it requests that petitioners if found guilty be "punished ... by imprisonment in the county jail for not more than five days and fined one thousand dollars ... for each separate violation...." (Emphasis added.) Petitioners have focused upon the wrong document. The claimed due process violation is not shown.

V

Petitioners contend that the judge who presided at the contempt hearing should have recused himself pursuant to Code of Civil Procedure section 170.1, subd. (a)(1).[4] The contention is based on the following exchange between the court and petitioners' counsel at the first hearing concerning possible confusion engendered in petitioner Sparks' mind by the terms of the injunction:

"THE COURT: ...[S]ometime last year we were all together on another contempt citation wherein the defense

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[4]Petitioners admit they "could not exercise a peremptory challenge pursuant to CCP section 170.6 at the [first] contempt hearing because they had already exhausted their single peremptory challenge in the action."

Subdivision (a)(1) of section 170.1 provides in pertinent part: "A judge shall be disqualified if any one or more of the following is true: [¶] The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. [¶] A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge ... is ... likely to be a material witness in the proceeding."

was basically the same.

"MS. GRAYSON: Your Honor, that was quite a different situation. Last year, immediately after the order [for the injunction] was entered, there was a legal dispute as to whether it was mandatory in character or whether it was prohibitory in character.

"THE COURT: Correct.

"MS. GRAYSON: And in that situation, I took the initiative by immediately writing a letter citing extensively the authority to adverse counsel setting forth my position as to why it was mandatory in character and we stipulated. It was no matter of sneaking around the building inspectors or anything else. We stipulated that we were not complying with the injunction pending appeal because we believe[d] it was stayed. It was a mandatory injunction. This court ruled otherwise, but it was really nothing like this situation in any respect.

"THE COURT: Now what I heard you say, I think, was that your client wanted to make sure that there weren't conflicting court orders and so, therefore, before his management did anything, he wanted to make sure that everybody was on the same track.

"MS. GRAYSON: That's essentially what I'm saying.

"THE COURT: Which is basically what we were talking about a year ago...."

We cannot agree with petitioners that these comments

evidence either bias or a ground for disqualification. A fair reading of the exchange discloses confusion as to the nature of the injunction (a state of affairs that has not abated; see part II, *ante*), but petitioners' counsel emphasized that it was "quite a different situation" and "really nothing like this situation in any respect." If the nature of the injunction's collateral effect were at issue, petitioners would have argued that no attempt at compliance was necessary and there could be no contempt. Instead, petitioners were concerned only with the extent and good faith nature of their attempts at compliance with the injunction; they thus conceded the possibility that there could be contempt, while arguing that there was no contempt in actuality. There appears not the remotest possibility that the judge would be called as a material witness had he not presided at either of the two contempt hearings.

VI

The transcript of the first hearing leaves no doubt that, although court and counsel were treating the affidavits submitted in connection with the order to show cause as forming the evidentiary basis for discussion and eventual decision, the affidavits themselves were never offered or received in evidence. Petitioners are correct in claiming this constitutes a reversible defect.

"The affidavits upon which the orders to show cause were issued served as the complaint charging the contempt. They might also serve as evidence at the hearing but they did not constitute such evidence until offered and received by the court, and upon their being offered petitioner would have the right to object to any matter stated therein upon any proper

legal ground as to its relevancy or competency.... [H]e would also have the right, if the evidence was offered and received, to cross-examine the affiant [citation]. Without the affidavits having been offered and without the petitioner having had a right to challenge the relevancy or competency of the matter set forth in the affidavits, he was deprived of a trial of the issues tendered by the affidavits according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights.... [T]he court ... could not take judicial notice or assume as true the facts stated in the affidavits until the [petitioner] had had the opportunity to challenge those facts as evidence, and when it did so it deprived petitioner of due process [citation]. Procedural due process being lacking, the judgments of contempt must ... be annulled." (*Collins v. Superior Court* (1956) 145 Cal.App.2d 588, 594-595 [emphasis added]; accord *Ransom v. Superior Court* (1968) 262 Cal.App.2d 271, 276-277; *Bone v. Superior Court* (1966) 245 Cal.App.2d 972, 973-974; *Collins v. Superior Court* (1957) 150 Cal.App.2d 354, 364.)

It is understandable how this situation occurred. Counsel for both sides as well as the court simply assumed that the supporting and opposing affidavits, being already a part of the court's file, were before the court as if they had in fact been formally offered and admitted in evidence. The authorities just cited, however, demonstrate that error did occur, and that it infected the entire proceeding. By virtue of the error's fundamental and pervasive nature, the resulting order of contempt must be annulled.

VII

With respect to the second hearing, the declarations which caused issuance of the order to show cause were admitted in evidence. Respondent court also heard testimony from the declarations. Nevertheless, petitioners' claim that the ensuing order of contempt lacks the support of substantial evidence must be upheld in its near-entirety.

Of the 178 counts of contempt eventually found, 172 pertained to instances of petitioners renting to tourists hotel rooms designated by the City for residential use. The evidence concerning these counts was received over petitioners' hearsay objection. That objection should have been sustained.

The declaration of Deputy City Attorney Clarke recites in effect that, as a result of the inspection conducted on September 1, 1989, it was determined that during the previous month petitioners had exceeded the permissible number of rooms that could be rented to tourists. During his testimony, however, Clarke admitted that these recitals summarized conclusions reached by inspectors from the City's Bureau of Housing Inspection.

The declaration of Building Inspector Porter is essentially to the same effect as Clarke's. It is clear from Porter's declaration that the conclusion regarding improperly rented rooms was the result of the inspection conducted by Porter and two other inspectors. Porter testified at the contempt hearing, but the other inspectors did not. Porter explained that the improper rentings conclusion came from an inspection of the hotel's "registration cards" for the relevant

period. The cards were not produced at the hearing, nor were they qualified as business records. (See Evid. Code, §§ 1270-1272.) Porter admitted that he did not personally inspect all of the cards, but was part of a collaborative effort of all three inspectors: "We worked together on the project, but we each reviewed a certain number of registration cards. There were too many for all three of us to review at once."

The cards themselves were hearsay evidence that rooms had in fact been rented on the dates indicated. Porter was recounting hearsay evidence of the information purportedly recorded on the cards. Finally, Porter was in effect incorporating the hearsay conclusion derived by the other inspectors' reading of the cards Porter had not personally reviewed. Porter's testimony and his declaration to these effects thus constituted multiple hearsay that should have been excluded on petitioners' objection. (See Evid. Code, §§ 1200-1201.) In the absence of these sources of evidence, there is not proof to sustain the 172 counts of improper room rentals.

Of the six remaining counts, three also involved the September 1, 1989 inspection. The counts were that petitioners had failed to permit inspection; failed to post the certificate of use issued by the City; and failed to post the current weekly report. Porter and Clarke testified that petitioner Sparks and the hotel manager had initially refused admittance and denied the officials' right to inspect. Each also testified as to the absence of the certificate of use, which the ordinance requires to be posted. Porter also testified that petitioners had not complied with the ordinance requirement that the weekly report be posted. These counts have the requisite evidentiary support.

The final three remaining counts--identical to the three just discussed--related to an inspection conducted on May 20, 1989. Porter's declaration and the testimony of Building Inspector Darrill Langer support the contempt findings on these counts.

The only remaining argument made by petitioners which requires comment is their claim that the May 20 and September 1 searches violated their Fourth Amendment rights because no search warrant was obtained. The purpose of the warrant requirement is to ensure judicial participation to curtail indiscriminate rummaging. (See *Johnson v. United States* (1948) 333 U.S. 10, 13-14.) The judicial participation petitioners desire was afforded them at the time the injunction was requested, opposed, and issued. The court thus confined the scope of the official intrusion it was authorizing against petitioners. The searches that occurred thereafter were conducted under authority of the injunction, and petitioners make no claim that the inspecting officers exceeded the scope of the injunction. In light of the fact that petitioners had already obtained a judicial evaluation of the inspection, we see no point to requiring the inspecting authorities to obtain a second and completely duplicative authorization possessing no greater dignity.

The order of contempt dated December 5, 1988, is annulled.

The order of contempt dated November 21, 1989, is annulled with respect to all counts pertaining to petitioners renting resident rooms to tourists. The order is otherwise affirmed.

The stays heretofore issued are dissolved.

AFFIRMED IN PART
REVERSED IN PART

POCHÉ, J.
PERLEY, J., CONCURRING

Sparks v. Superior Court
AO45150 and AO47823

CONCURRING OPINION

I concur fully in the court's opinion.

In its original opinion filed November 14, 1990, the majority affirmed each of the 178 counts of contempt found on November 21, 1989. I dissented because I believed the imposition of the aggregate fine of $89,000 ($500 per count) was impermissible in the absence of the contemnor being given the opportunity of having a jury trial.

In the court's present opinion, 172 of those 178 counts are ordered annulled; six counts are affirmed. An aggregate maximum fine of $3,000 attaches to those remaining counts. Although the issue has not been authoritatively decided, the United States Supreme Court has implied that a jury trial would not be required until a fine against an individual reaches the $5,000 level. (See *Blanton v. North Las Vegas* (1989) 489 U.S. 538 [103 L.Ed.2d 550, 557; cf. 18 U.S.C. § 1(3).) As the $3,000 fine for the six counts remaining from the November 1989 hearing falls well below that $5,000 level, no jury trial was necessary. Therefore, I now join fully in the opinion of my colleagues.

ANDERSON, P.J.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

FILED
DEC 10, 1990
Court of Appeal-First App.Dist.
RON D. BARROW
By Deputy

CITY AND COUNTY OF SAN FRANCISCO
v.
PACIFIC BAY INN, ET AL.
ADAM SPARKS
A041905
San Francisco County
Superior Court No. 885533

ADAM SPARKS
ON HABEAS CORPUS
A045150 & A047823
Superior Court No. 885533

BY THE COURT:

Rehearings of the above-captioned matters are granted on the court's own motion. The petitions for rehearing are denied as moot. The causes are ordered submitted.

DATED: DEC 10 1990

ANDERSON, P.J.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

ADAM SPARKS, et al.,	FILED
	NOV 14, 1990
Petitioners,	Court of Appeal-First App. Dist.
	RON D. BARROW
v.	By Deputy
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	No. AO45150 No. AO47823
Respondent,	
CITY AND COUNTY OF SAN FRANCISCO,	
Real Party in Interest.	

Petitioners Adam Sparks and Pacific Bay Inn, Inc., own and operate a hotel which real party in interest City and County of San Francisco (City) asserts is governed by its Residential Hotel Unit Conversion and Demolition Ordinance (S.F. City Admin. Code, ch. 41). The fundamental feature of this ordinance is its distinction between residential units (which are heavily regulated) and tourist units (which are

largely left unregulated). Petitioners' hotel has 84 rooms, 69 of which are classified as residential. Subsequent to the rebuilding of their hotel in the wake of a fire, petitioners have taken the position that the ordinance has no application to their hotel and cannot hinder them from letting all 84 rooms as tourist units.

In April of 1988 respondent court entered a preliminary injunction by which petitioners were ordered (1) not to rent more than a certain number of units for tourist use; (2) to comply with specified record and notice provisions of the ordinance; and (3) to allow administrative inspection "with two hours notice, no more than three times each month" and "to surrender all hotel registration records, room receipts, and other relevant documents at each such inspection and to allow the housing inspectors to make a room by room inspection of the premises at each such inspection."[1]

Persuaded by the City's application that petitioners were not in compliance with the injunction, respondent court issued an order to show cause why petitioners should not be held in contempt. In their response petitioners submitted that the violations were not nearly as numerous as alleged and were largely accidental. In February of 1989 respondent court conducted a hearing on the order, found 32 "separate violations,"[2] and ordered that petitioner Sparks pay $8,000

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[1]The injunction is the subject of an appeal by petitioners currently pending in this court (*City and County of San Francisco v. Pacific Bay Inn, Inc.*, AO41905).

[2]Two of the "violations" were for "failure to allow inspection"; five were for failures to provide records (presumably to administrative inspectors) and to post notices; and 25 were for "resident rooms rented to tourists." The violations occurred on one day in September of 1988 and two days in October of that year.

($250 for each violation) and be imprisoned for one day in the county jail for each violation. Upon petitioners' application filed in conjunction with their petition for extraordinary relief in AO45150, we stayed enforcement of the contempt order later that month.

The process was repeated again in 1989. This time, following an unreported hearing, respondent court found both petitioners guilty of 178 acts of contempt.[3] In November of that year respondent court ordered petitioner Sparks to pay $89,000 ($500 for each violation) and be imprisoned for 178 days in the county jail, this term of imprisonment to be served consecutively to the previous term of 32 days. Once again, we stayed enforcement of the contempt order when petitioners invoked our original jurisdiction in AO47823.

REVIEW

I

Each of the petitions filed herein prays for issuance of writs of habeas corpus and certiorari. "Although an order made in a contempt proceeding is not appealable [citations], it may be reviewed by certiorari or, where appropriate, by habeas corpus [citations]." (*In re Buckley*, (1973) 10 Cal.3d 237, 259.) Petitioner Sparks can apply for relief in habeas corpus because he faces punishment by incarceration; petitioner Pacific Bay Inn, Inc. is not entitled to seek that

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[3]As recited in the subsequent formal order of contempt, the violations occurred on one day in May of 1989, eight days in August, and one day in September of that year. Only one of the violations was for "failure to allow inspection." Five related to records and notices. The remaining 172 violations were for "resident rooms rented to tourists."

remedy because it does not confront imprisonment or fines. (See *In re Coleman*, (1974) 12 Cal.3d 568, 572, fn. 2; *Lloyd v. Superior Court* (1982) 133 Cal.App.3d 896, 899, fn. 1.) Why a corporation feels the need for vindication in these circumstances is not readily apparent. Nevertheless, petitioners' mutual desire in this respect will be accommodated by treating the petitions as seeking certiorari alone. The point is largely academic, given that "[t]he scope of review upon an application for a writ of habeas corpus is identical to that by way of a writ of certiorari...." (*In re Karpf* (1970) 10 Cal.App.3d 355, 364.) Our Supreme Court has made it clear just how limited is that review: "In reviewing an adjudication of contempt, 'the sole question before us is one of jurisdiction of the trial court to render the judgment under review, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the jurisdiction of the trial court.' [Citations.] More recently we said that "the responsibility of the reviewing Court is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.'" (*In re Buckley, supra,* at p. 247.)

In light of the wide-ranging nature of the deficiencies which petitioners perceive in the orders, it is appropriate to begin with some general principles governing contempt.

In its legal sense, contempt has been defined as "a disobedience of court by acting in opposition to its authority, justice or dignity...." (*Raskin v. Superior Court* (1934) 138 Cal.App. 668, 670.) Its manifestations come within two classifications. "Direct contempt is that committed in the

immediate view and presence of the court or of the judge at chambers; all other contempts are indirect[,] which by definition occur outside the presence of the court." (*Nierenberg v. Superior Court* (1976) 59 Cal.App.3d 611, 616.) Indirect contempts, such as those found to have been committed by petitioners, can be charged and punished under either the Penal Code (Pen. Code, § 166, subds. 4, 5) or the Code of Civil Procedure (Code Civ. Proc., § 1209, subd. (a)(5).) "A proceeding for punishment of indirect contempt is commenced by an affidavit which is in effect a complaint; this 'frames the issues before the court and is a jurisdictional prerequisite to the court's power to punish....'" (*Rosenstock v. Municipal Court* (1976) 61 Cal.App.3d 1, 7-8; see Code Civ. Proc. § 1211.)

II

Petitioners begin their attack on the orders with two general arguments, each of which they see as adequate to kill the contempt proceedings at the outset. First, they focus on the constitutionality of the ordinance. California permits attack on contempt orders based on purported violation of statutes or prior orders that are unconstitutional on their face. (See *In re Misener* (1985) 38 Cal.3d 543 [statute]; *In re Berry* (1968) 68 Cal.2d 137, 147-148 [court order].) Although petitioners do not press such an attack against the injunction, they do contend that the ordinance fails the test of constitutionality. Petitioners are incorrect. (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1088-1089; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 907-912.)

III

Petitioners' second general prong concerns the character of the preliminary injunction. Petitioners see it as mandatory, and thus automatically stayed when they perfected their appeal. The City is equally adamant that the injunction was prohibitory and thus not stayed. A review of the authorities cited by both sides and of the equally persuasive arguments they marshal, demonstrates just how difficult it may be to classify an injunction. What petitioners view as mandatory aspects of the injunction ordering them to comply with the ordinance, are just as easily seen by the City as prohibitions against petitioners continuing to disobey the ordinance. Rather than undertake to pin our own tag on the injunction, we are inclined to defer to respondent court's opinion of its own order as prohibitory. Respondent is the best authority of what it intended, and we will defer to its characterization.

IV

Petitioners cannot prevail on their contention that their due process rights of notice at the first contempt proceeding were violated because they "were misinformed as to the nature of the charges against them, by the City's Memorandum of Points and Authorities ..., which indicated that the City sought a jail term not to exceed five days. The contempt proceedings against petitioners were founded upon the Code of Civil Procedure, which provides that if a person is found "guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ..., or he or she may be imprisoned not exceeding five days, or both." (Code Civ. Proc., § 1218.) In the specified memorandum the City requested "an order of the Court adjudging PACIFIC

BAY INN and ADAM SPARKS to be guilty of contempt and punished therefore by imprisonment in the county jail for not more than five days, and fined $1,000 for each of the thirty-two violations...." As previously mentioned, the relevant accusatory document is the City's affidavit (see *Rosenstock v. Municipal Court, supra,* 61 Cal.App.3d 1 at pp. 7-8) wherein it requests that petitioners if found guilty be "punished ... by imprisonment in the county jail for not more than five days and fined one thousand dollars ... for each separate violation...." (Emphasis added.) Petitioners have focused upon the wrong document. The claimed due process violation is not shown.

V

Petitioners next contend that respondent court infringed their rights under both the California and the United States Constitutions when it denied their request for a jury trial at the second contempt proceeding.[4] Our Supreme Court has recently reiterated its position that Code of Civil Procedure contempts are not within the California Constitution's jury trial guarantee. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1240, 1249.) The like provision in the United States Constitution activates only when offenses cross the dividing line from "petty" to "serious". The boundary between these categories is marked (See *Muniz v. Hoffman* (1975) 422 U.S. 454, 475-476; *Codispoti v. Pennsylvania* (1974) 418 U.S.

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[4]Petitioners' request for a jury trial was conveyed to respondent court in the form of a letter from petitioners' counsel.

Although petitioners' argument is also directed at the first proceeding, our discussion is confined to the second proceeding because the 32 days of imprisonment ordered falls far short of the 6 month threshold for jury trial. (See discussion in text, *post.*)

506, 512.) The fact that petitioner Sparks might have faced a minimum of 890 days imprisonment is not determinative. What counts is that the 178 days of imprisonment ordered for petitioner Sparks is less than six months; the "serious" border was not crossed. (See *Codispoti v. Pennsylvania, supra*; *Taylor v. Hayes* (1974) 418 U.S. 488, 495-496.)

The hairsbreadth proximity of the jail time imposed to the six-month divider inevitably leads one to inquire whether the imposition of fines in addition to imprisonment of less than six months pulls petitioners into the promised land of jury trials. We conclude that it does not. The fines assume significance only if viewed in the aggregate and if imposed in conjunction with a term of imprisonment of precisely six months. (See *Mitchell v. Superior Court, supra*, 49 Cal.3d 1230 at p. 1245, fn. 11.) But the imprisonment ordered fell just shy of the six-month period. With respect to the fines, if each is viewed individually they do not "clearly reflect a legislative determination that the offense in question is a 'serious' one." (*Blanton v. City of North Las Vegas, Nev.* (1989) 489 U.S. 538, ____ [109 S.Ct. 1289, 1293].)

VI

Petitioners contend that the judge who presided at the contempt hearing should have recused himself pursuant to Code of Civil Procedure section 170.1, subd. (a)(1).[5] The

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[5]Petitioners admit they "could not exercise a peremptory challenge pursuant to CCP section 170.6 at the [first] contempt hearing because they had already exhausted their single peremptory challenge in the action."

Subdivision (a)(1) of section 170.1 provides in pertinent part: "A judge shall be disqualified if any one or more of the following is true: [¶] The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. [¶] A judge shall

contention is based on the following exchange between the court and petitioners' counsel at the first hearing concerning possible confusion engendered in petitioner Sparks' mind by the terms of the injunction:

"THE COURT: ...[S]ometime last year we were all together on another contempt citation wherein the defense was basically the same.

"MS. GRAYSON: Your Honor, that was quite a different situation. Last year, immediately after the order [for the injunction] was entered, there was a legal dispute as to whether it was mandatory in character or whether it was prohibitory in character.

"THE COURT: Correct.

"MS. GRAYSON: And in that situation, I took the initiative by immediately writing a letter citing extensively the authority to adverse counsel setting forth my position as to why it was mandatory in character and we stipulated. It was no matter of sneaking around the building inspectors or anything else. We stipulated that we were not complying with the injunction pending appeal because we believe[d] it was stayed. It was a mandatory injunction. This court ruled otherwise, but it was really nothing like this situation in any respect.

"THE COURT: Now, what I heard you say, I think, was that your client wanted to make sure that there weren't

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be deemed to have personal knowledge within the meaning of this paragraph if the judge ... is ... likely to be a material witness in the proceeding."

conflicting court orders and so, therefore, before his management did anything, he wanted to make sure that everybody was on the same track.

"MS. GRAYSON: That's essentially what I'm saying.

"THE COURT: Which is basically what we were talking about a year ago...."

We cannot agree with petitioner that these comments evidence either bias or a ground for disqualification. A fair reading of the exchange discloses confusion as to the nature of the injunction (a state of affairs that has not abated; see part II, *ante*), but petitioners' counsel emphasized that it was "quite a different situation" and "really nothing like this situation in any respect." If the nature of the injunction's collateral effect were at issue, petitioners would have argued that no attempt at compliance was necessary and there could be no contempt. Instead, petitioners were concerned only with the extent and good faith nature of their attempts at compliance with the injunction; they thus conceded the possibility that there could be contempt, while arguing that there was not contempt in actuality. There appears not the remotest possibility that the judge would be called as a material witness had he not presided at either of the two contempt hearings.

VII

The transcript of the first hearing leaves no doubt that, although court and counsel were treating the affidavits submitted in connection with the order to show cause as forming the evidentiary basis for discussion and eventual decision, the

affidavits themselves were never offered or received in evidence. Petitioners are correct in claiming this constitutes a reversible defect.

"The affidavits upon which the orders to show cause were issued served as the complaint charging the contempt. They might also serve as evidence at the hearing but they did not constitute such evidence until offered and received by the court, and upon their being offered petitioner would have the right to object to any matter stated therein upon any proper legal ground as to its relevancy or competency.... [H]e would also have the right, if the evidence was offered and received, to cross-examine the affiant [citation]. Without the affidavits having been offered and without the petitioner having had a right to challenge the relevancy or competency of the matter set forth in the affidavits, he was deprived of a trial of the issues tendered by the affidavits according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights.... [T]he court ... could not take judicial notice of and assume as true the facts stated in the affidavits until the [petitioner] had had the opportunity to challenge those facts as evidence, and when it did so it deprived petitioner of due process [citation]. Procedural due process being lacking, the judgments of contempt must ... be annulled." (*Collins v. Superior Court* (1956) 145 Cal.App.2d 588, 594-595 [emphasis added]; accord *Ransom v. Superior Court* (1968) 262 Cal.App.2d 271, 276-277; *Bone v. Superior Court* (1966) 245 Cal.App.2d 972, 973-974; *Collins v. Superior Court* (1957) 150 Cal.App.2d 354, 364.)

It is understandable how this situation occurred. Counsel for both sides as well as the court simply assumed

that the supporting and opposing affidavits, being already a part of the court's file, were before the court as if they had in fact been formally offered and admitted in evidence. The authorities just cited, however, demonstrate that error did occur, and that it infected the entire proceeding. By virtue of the error's fundamental and pervasive nature, the resulting order of contempt must be annulled.

VIII

A similar problem exists with respect to the second order. Petitioners contend that evidence admitted at the second hearing was incompetent, the product of an illegal search, and not of sufficient substantiality to support the resulting order. Because petitioners have failed to furnish us with a transcript of that hearing, their contentions must be rejected as unsubstantiated. (*Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 156; *Rose v. Superior Court* (1941) 44 Cal.App.2d 599, 600-601.)

IX

Only two of petitioners' remaining contentions merit brief comment. Contrary to petitioner's claim, each instance of their renting a residential unit for tourist use constituted a separate contempt which could be punished as such. (See *Donovan v. Superior Court* (1952) 39 Cal.2d 848, 855.) With respect to the fines and imprisonment imposed by the second order, no violation of constitutional prohibitions of cruel, excessive, or unusual punishment is presented. The same conclusion will apply if retrial of the first contempt proceeding produces an order similar to the one we have determined must be annulled for a different reason. (*Id.* at

p. 855; *In re Garner* (1918) 179 Cal. 409, 413-415.) The period of imprisonment imposed, and here we address the second order, is not unlimited. (Cf. *Ex Parte Karlson* (1911) 160 Cal. 378, 383.) It does not even come close to the maximum permitted by statute. Petitioners are tacitly arguing for the position that an increase in the vast number of their contempts somehow corresponds to a diminution of the court's power: the greater the contempt, the less the power to correct it. This court does not embrace such a view. The order of contempt dated December 5, 1988, is annulled. The order of contempt dated November 21, 1989 is affirmed. The stays heretofore issued are dissolved.

AFFIRMED IN PART
REVERSED IN PART

POCHÉ, J.
PERLEY, J., CONCURRING

Sparks v. Superior Court
AO45150 and AO47823

DISSENTING OPINION

I dissent from part V of the majority's opinion holding that petitioners were not entitled to a jury trial at the second contempt proceeding. (Maj. opn., *ante*, pp.8-9.)

In 1989, petitioners were found guilty of 178 acts of contempt. In November of that year, the trial court ordered petitioner Sparks to pay $89,000 ($500 for each violation) and to be imprisoned for 178 days in the county jail, this term to be served consecutively to the previously imposed term of 32 days. (Maj. opn., *ante*, p.3) In my opinion, the imposition of a contempt sentence which includes an aggregate fine of $89,000 triggered a right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

Preliminarily, I agree with the majority that, unlike contempts brought under the Penal Code, the Code of Civil Procedure contempt statute involved in this case (Code. Civ. Proc., § 1209 et seq.) "triggers neither a state constitutional nor statutory right to a jury trial. [Citations.]" (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1244, emphasis added.)

Moreover, I agree with the majority that so much of the cumulative contempt sentence as provides for 178 days of imprisonment does not trigger any right to a jury trial under the United States Constitution. (See *Muniz v. Hoffman*

(1975) 422 U.S. 454, 475-476 [imprisonment for longer than six months constitutionally impermissible unless contemnor given opportunity for a jury trial]; *Codispoti v. Pennsylvania* (1974) 418 U.S. 506, 512 [right to jury trial applies if jail term is more than six months].

I part company with the majority, however, when it suggests that if the fines are "viewed individually," they do not reflect a legislative determination that the offense in question is a serious one, or "if viewed in the aggregate," the fines assume significance only if imposed in conjunction with a term of imprisonment of precisely six months. (Maj. opn., *ante*, at p.9.)

First, for purposes of this analysis, I believe that fines imposed in a single contempt proceeding are to be viewed in the aggregate, and not individually, when ascertaining whether the punishment reflects conduct serious enough to require a jury trial. By analogy, in *Codispoti v. Pennsylvania*, *supra*, 418 U.S. 506, the co-defendants had each committed several contemptuous acts, and aggregate jail terms of three years, three months and two years, eight months, respectively, were imposed. (*Id.*, at pp. 509-510.) The United State Supreme Court rejected an argument that each contempt was necessarily a petty offense triable without a jury because no more than a six-months' sentence was imposed for any single offense. (*Id.*, at p. 517.) "In terms of the sentence imposed, which was obviously several times more than six months, each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury

trial."[1] (*Ibid.*) It would seem the same principle should be applied when the fines imposed at a single proceeding for several contempt violations, when aggregated, add up to a substantial amount.

The usual penalties for contempt are fine and imprisonment. As to imprisonment, when the Supreme Court drew the line for triggering a right to a jury trial at six months, it did so in part because 18 United States Code section 1(3) established this maximum period of incarceration as an objective criterion for a "petty" offense.[2] (*Codispoti v. Pennsylvania*, *supra*, 418 U.S. 506, 512.)

As to fines, the Supreme Court in *Muniz v. Hoffman*, *supra*, 422 U.S. 454 addressed the question whether and in what circumstances, if at all, the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial if demanded by the defendant. (*Id.*, at pp. 475-477.) In that case, a $10,000 fine had been imposed against an unincorporated labor union. The Supreme Court declined to adopt the $500 maximum in 18 United States Code section 1(3) as the invariable criterion of an offense triable without a jury. While recognizing that "six months in

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[1]Where the judge has discretion to impose more than six months by imposing consecutive sentences, it is the judge's exercise of that discretion, not the mere fact that he has discretion, that determines whether the offense is "petty" or "serious." (See *Mitchell v. Superior Court*, *supra*, 49 Cal.3d at p.1245, fn. 11, citing *Maita v. Whitmore* (9th Cir. 1974) 508 F.2d 143, 146, cert. den. 421 U.S. 947.

[2] Until 1984, 18 United States Code section 1(3) defined "petty" crimes as those crimes "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both."

In 1984, Congress increased the maximum fine for a federal petty offense committed by an individual from $500 to $5,000. (18 U.S.C. §1(3), as amended.)

jail is a serious matter for any individual," the court said it was "not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union." (*Id.*, at p. 477.) Noting that the union involved had 13,000 members (the fine therefore approximating 75 cents per member), the court held the fine in that case was not "a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake." (*Ibid.*; see *United States v. Hamdan* (9th Cir. 1977) 552 F.2d 276, 278-279.)

While no precise standards have emerged from the federal cases after *Muniz* as to where the line is drawn between a "petty" and "serious" offense when a substantial fine is imposed (see *Mitchell v. Superior Court, supra*, 49 Cal.3d at p. 1245, fn. 11), some trends have appeared.

First, the federal cases tend to look to whether the defendant is an individual (see, e.g., *Douglass v. First Nat. Rlty. Corp.* (D.C. Cir. 1976) 543 F.2d 894, 902) or "a large corporation or labor union" (see *Muniz v. Hoffman, supra*, 422 U.S. at p. 477). When individuals are involved, there is a greater tendency to reverse or modify due to excessive fines.

Second, in cases involving individuals, at least three circuits have expressly relied upon the $500 figure in 18 United States Code section 1(3) as the basis for their decisions. (*United States v. McAlister* (10th Cir. 1980) 630 F.2d 772, 774; *United States v. Hamdan* (9th Cir. 1977) 552 F.2d 276, 279-180; *Douglass v. First Nat. Rlty. Corp., supra*, 543 F.2d 894, 901 [D.C. Circuit].) While the Eighth Circuit was unwilling to adopt $500 as an absolute boundary,

it held that fines ranging from $2,500 to $10,000 assessed against individuals found in contempt by a state court were penalties serious enough to trigger a right to a jury trial. (*Girard v. Goins* (8th Cir. 1978) 575 F.2d 160, 165.)

In 1984, 18 United States Code section 1(3) was amended, increasing the dollar amount from $500 to $5,000. (See fn. 2, *ante*.) No federal case has yet turned on the new dollar figure. The Ninth Circuit made reference to the new statute in *Rife v. Godbehere* (9th Cir. 1987) 814 F.2d 563, 565, as modified at 825 F.2d 185, but the court held the offense in that case had occurred before the new statute took effect. Applying the pre-existing $500 standard, the court held that a defendant punishable by a $1,000 fine was entitled to a jury trial. (*Id.*, 814 F.2d at 565.) More recently, in dicta, the Supreme Court implied that an authorized fine of $1,000 would not require a jury trial because that figure was "well below the $5,000 level set by Congress in its most recent definition of a 'petty' offense, 18 U.S.C. section 1(3). . . ." (*Blanton v. North Las Vegas* (1989) 489 U.S. 538 [103 L.Ed.2d 550, 557].)

Where does all of this lead? That question was recently asked by the Fifth District when confronted by a regulatory offense punishable by a $500 fine, plus penalty assessments of $350. (*People v. Anderson* (1987) 191 Cal.App.3d 207, 216-220.) While holding that the potential penalty of $850 did not require a jury trial under either the federal or state Constitutions, by way of dictum the court advised the Legislature against raising the penalty applicable to an individual to $1,000 or more, since that would trigger the federal constitution right to a jury trial. (*Id.*, at pp. 212, 220.)

To sum up, the case law is unclear as to where the precise monetary line is currently to be drawn constitutionally, whether at $1,000 as suggested by *People v. Anderson*, *supra*, 191 Cal.App.3d 207, at $5,000 as implied by *Blanton v. North Las Vegas*, *supra*, 489 U.S. 538, or whether it is to be left to a case-by-case analysis as applied to the labor union in *Muniz v. Hoffman*, *supra*, 422 U.S. 454, 475-477. Under any of these tests, I would conclude that the imposition of an aggregate fine as large as the $89,000 fine in this case was impermissible in the absence of the contemnor being given the opportunity of having a jury trial.

I find support for my conclusion in what I believe to be well-considered dicta in *Mitchell v. Superior Court*, *supra*, 49 Cal.3d 1230. In *Mitchell*, the lead opinion stated that the misdemeanor contempt judgment imposed therein under Penal Code section 11229 (part of the Red Light Abatement Act) had to be annulled because the defendants were deprived of their state constitutional right to a trial by jury. As it decided that case under state law, the Supreme Court did not have to reach the federal claims. (*Id.*, at p. 1244-1245.) In a footnote, however, the court cited many of the federal cases discussed above and concluded: "It seems probable that the cumulative contempt sentence which the trial court imposed in this case [*Mitchell*] under [Penal Code] section 11229--six months' imprisonment and a substantial $62,000 fine--would trigger a right to a jury trial under current federal precedents." (*Id.*, at p. 1245, fn. 11.) I would so hold in this case.

In my mind, the only remaining issue is the significance, if any, whether the contempt proceedings were brought under Code of Civil Procedure section 1209 et seq. rather than under the misdemeanor contempt provisions found in Penal Code section 166. (See *Mitchell v. Superior Court*, *supra*, 49 Cal.3d at pp. 1239-1241.) For purposes of applying federal constitutional law, I would say it does not. In *Douglass v. First Nat. Rlty. Corp.*, *supra*, 543 F.2d 894, the first case to recognize a right to jury trial when only a fine is imposed, the court asked "'what does the court primarily seek to accomplish by imposing sentence?' If the purpose is to coerce compliance, the penalty is civil; if the goal is punishment for past disobedience, the exaction is criminal." (*Id.*, at p. 898, fn. omitted.)

In this case, the court's objective seems manifest. In addition to the size and scope of the penalties imposed, there was no provision affording appellant an opportunity to purge himself and thereby obtain release or to avoid the payment. To the petitioner, the sanctions imposed upon him were no less onerous by virtue of his being charged under the Code of Civil Procedure rather than the Penal Code.

For the above reasons, I would annul the order of contempt dated November 21, 1989.

ANDERSON, P.J.

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91-1972

No. _____

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In The

Supreme Court of the United States

October Term, 1991

In the Matter of ADAM SPARKS,

Petitioner,

On Habeas Corpus.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER ADAM SPARKS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED..... ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT

I. A PROFOUND CONFLICT EXISTS AMONG THE JURISDICTIONS AS TO THE CONSTITUTIONALITY OF ENFORCING UNCONSTITUTIONAL ORDERS 4

II. CALIFORNIA COURTS MAY NOT ENFORCE CRIMINAL CONTEMPT PENALTIES STEMMING FROM THE VIOLATION OF AN UNCONSTITUTIONAL ORDINANCE 6

III. SAN FRANCISCO'S HOTEL ORDINANCE TRANSPARENTLY VIOLATES PETITIONER'S FUNDAMENTAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION..... 7

IV. BY FAILING TO APPLY THE CALIFORNIA RULE ALLOWING COLLATERAL ATTACK ON THE CONSTITUTIONALITY OF THE RESIDENTIAL HOTEL ORDINANCE, THE COURT BELOW IMPROPERLY FORCES PETITIONER TO UNDERGO CRIMINAL PENALTIES FOR FAILING TO ACQUIESCE IN THE VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS 10

CONCLUSION 11

TABLE OF AUTHORITIES CITED

Page

Cases

Bullock v. City and County of San Francisco, 221 Cal. App. 3d 1072 (1990) 9
Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) 8
Corenevsky v. Superior Court of Imperial County, 36 Cal. 3d 307 (1984) 6
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 6
Ex Parte Purvis, 382 So. 2d 512 (Ala. 1980) 5
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2
Hodel v. Irving, 481 U.S. 704 (1987) 2
In re Berry, 68 Cal. 2d 137 (1968) 5, 6, 7, 10, 11, 12
Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 2
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2, 8, 9, 12
Walker v. City of Birmingham, 388 U.S. 307 (1967) 3, 5, 6, 10, 11

Rules and Regulations

San Francisco Administrative Code, Chapter 41 3
Supreme Court Rule 37 1

United States Constitution

Fifth Amendment 2, 3, 7, 8, 9, 11
Fourteenth Amendment 2, 3, 7, 8, 11

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER ADAM SPARKS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000

contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Irving*, 481 U.S. 704 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

STATEMENT OF THE CASE

Petitioner, a small hotel operator, seeks federal habeas corpus relief from an order of the San Francisco County Superior Court sentencing him to jail for contempt. Petitioner faces imprisonment for failing to comply with injunctions issued pursuant to the San Francisco Hotel Anti-Conversion and Demolition Ordinance, San Francisco Administrative Code, Chapter 41. This ordinance forces petitioner to devote 69 rooms of his 84-room tourist hotel to sheltering homeless derelicts at drastically discounted rates—or alternatively, to ransom his property by making a cash payment to the City and County of San Francisco. On its face, this measure transparently comprises a regulatory taking of petitioner's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Federal District Court acknowledged the patent constitutional defects of the San Francisco hotel ordinance but dismissed the habeas corpus petition because of a misapplication of this Court's ruling in *Walker v. City of Birmingham*, 388 U.S. 307 (1967). In *Walker*, this Court upheld an Alabama rule barring defendants from challenging the validity of unconstitutional enactments as a defense to criminal contempt citations. However, this Court did not adopt the Alabama rule as a uniform standard, and California has expressly rejected the Alabama rule. By misapplying Alabama's procedural rule to a California defendant, the Federal District Court has added to the confusion surrounding these conflicting rules and deprived petitioner of fundamental constitutional safeguards.

SUMMARY OF ARGUMENT

Under California law, whether petitioner may rightfully be subjected to criminal contempt sanctions depends on the constitutional validity of San Francisco's Hotel Anti-Conversion and Demolition Ordinance. On its face, this ordinance comprises a transparent violation of the Takings Clause. The Federal District Court acknowledged this fact in considering petitioner's habeas corpus petition but failed to follow California law and declare that the state court lacked jurisdiction to hold petitioner in criminal contempt. Instead, the District Court applied a conflicting Alabama rule barring challenges to the constitutionality of directives as a defense to criminal contempt citations. This ruling, affirmed by the Ninth Circuit Court of Appeals, leaves petitioner in an unconscionable position: the state courts have refused to protect his federal constitutional rights, and the federal courts have failed to recognize petitioner's procedural rights under California law. Such an outcome is contrary to fundamental concepts of fairness and justice and will contribute to further confusion and conflicts among the jurisdictions.

ARGUMENT

I

A PROFOUND CONFLICT EXISTS AMONG THE JURISDICTIONS AS TO THE CONSTITUTIONALITY OF ENFORCING UNCONSTITUTIONAL ORDERS

The use of criminal contempt to enforce compliance or punish noncompliance with legitimate directives is an

indispensable feature of our judicial system. However, when the power of contempt is used in support of abusive and unconstitutional enactments, it becomes a tool of injustice. In such cases some rule is needed to prioritize the conflicting values of judicial authority and the sanctity of fundamental human rights.

The Constitution itself is silent as to whether the contempt power may properly be invoked to enforce compliance with unconstitutional mandates. In the absence of a uniform directive from this Court, two sharply conflicting rules have emerged from the various state and federal jurisdictions.

Several states, such as Alabama, employ a collateral bar rule under which the constitutional validity of an ordinance may not be challenged as a defense to criminal contempt sanctions arising from refusal to comply with the ordinance. This is true even when the measure is transparently unconstitutional and requires the irretrievable surrender of important constitutional rights. *Ex Parte Purvis*, 382 So. 2d 512 (Ala. 1980).

Contrary to this policy, California law provides that defendants appealing a criminal contempt citation may challenge the constitutional validity of the underlying directive. *In re Berry*, 68 Cal. 2d 137 (1968). Under the California rule, courts lack jurisdiction to issue injunctions enforcing unconstitutional directives, and "it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt." *Id.* at 147.

The Alabama collateral bar rule was upheld by this Court in *Walker v. Birmingham*, 388 U.S. 307, and the same

rule is applied in federal courts dealing with contempt actions arising from the violation of federal directives. When state contempt citations are reviewed by the federal judiciary, however, the rule of the individual state should govern. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

II

CALIFORNIA COURTS MAY NOT ENFORCE CRIMINAL CONTEMPT PENALTIES STEMMING FROM THE VIOLATION OF AN UNCONSTITUTIONAL ORDINANCE

In California, the rule is clear that no criminal sanctions may lawfully be enforced for violating an injunction if the underlying ordinance is unconstitutional. *In re Berry*, 68 Cal. 2d at 145. The validity of the injunction depends on the validity of the underlying enactment, which may be challenged via contempt proceedings. "[U]nder California law, a person may disobey an order and raise his defenses when he is sought to be held in contempt for such disobedience." *Corenevsky v. Superior Court of Imperial County*, 36 Cal. 3d 307, 327 (1984) (citing *Berry*).

Berry was decided *after Walker v. Birmingham* and embodies an express rejection of Alabama's collateral bar rule. The *Berry* rule was held to be "considerably more consistent with the exercise of [constitutional] freedoms than that adopted in Alabama, and it is therefore difficult to perceive how the *Walker* decision is of relevance." *In re*

Berry, 68 Cal. 2d at 150. This is a proper application of the general policy that states are free to afford their citizens *greater* constitutional safeguards than those guaranteed by the Federal Constitution, but may not fall *below* federal standards in protecting constitutional rights.

III

SAN FRANCISCO'S HOTEL ORDINANCE TRANSPARENTLY VIOLATES PETITIONER'S FUNDAMENTAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The ordinance at issue in this case prohibits petitioner from renting more than 15 rooms of his 84-room tourist hotel to tourists. The remaining 69 rooms must be devoted to what amounts to a public welfare program—housing derelict residents of San Francisco's Tenderloin District.

The ordinance not only fails to compensate petitioner for this confiscation of his private property, it requires petitioner to discount his normal room rates so drastically that his hotel would be forced into bankruptcy if he complied. The predatory nature of the regulation is most clearly revealed by a provision that excuses petitioner from complying with its terms if he agrees to pay a cash ransom to the City and County of San Francisco.

On its face, this measure comprises a transparent regulatory taking of petitioner's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This fact was forcefully acknowledged by the Federal District

Court in which petitioner's habeas corpus action was filed. In those proceedings, the court described the subject ordinance as an "unconscionable and flagrantly unreasonable imposition"; a "heinous and egregiously horrid" measure that "runs afoul of the Takings Clause of the United States Constitution." Recorders Transcript at 62-65.

This is a completely accurate characterization of San Francisco's residential hotel ordinance, as can be confirmed by the briefest glance at this Court's regulatory takings doctrine.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

In its leading case on regulatory takings, this Court has required that heightened judicial scrutiny be applied to property regulations challenged under the Takings Clause. *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3.[1] Applying heightened scrutiny to the San

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[1] Although California's First District Court of Appeal has had two opportunities to pass on the constitutionality of the residential hotel ordinance, it has refused to honor petitioner's right to heightened scrutiny under *Nollan*. When petitioner brought this question before that forum, the state panel swept aside petitioner's carefully reasoned constitutional arguments, reiterating its own policy of extreme deference to abusive (continued)

Francisco ordinance, it is clear that this measure was designed and enacted for the sole purpose of forcing a politically powerless minority to bear the full costs of providing a general public benefit. As such, the ordinance transparently violates the Takings Clause on its face.

The ordinance's avowed purpose of providing low-cost shelter for Tenderloin derelicts could no doubt be construed as a general public benefit to the City and County of San Francisco. But a general public benefit cannot, under the Fifth Amendment, be financed by holding the constitutional rights of hotel owners to ransom. The City and County of San Francisco has the authority, under its police power, to allocate its general revenues to subsidize any group it pleases. However, forcing one small group of property owners to bear the full costs of such a program is an affront to basic concepts of equity. This is a classic, indeed a prototype, violation of the Takings Clause, which "'bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. 40, 49 (1960)).

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regulations: "In California there is an extensive body of precedent rejecting such claims [*i.e.*, federal takings claims invoking *Nollan*] and displaying a generally tolerant attitude to municipal ordinances in this area." *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1089 (1990).

IV

BY FAILING TO APPLY THE CALIFORNIA RULE ALLOWING COLLATERAL ATTACK ON THE CONSTITUTIONALITY OF THE RESIDENTIAL HOTEL ORDINANCE, THE COURT BELOW IMPROPERLY FORCES PETITIONER TO UNDERGO CRIMINAL PENALTIES FOR FAILING TO ACQUIESCE IN THE VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS

The Federal District Court accurately described San Francisco's residential hotel ordinance as a "heinous and egregiously horrid" violation of the Takings Clause. Under California law, such a finding would mean that the Superior Court lacked jurisdiction to compel petitioner to comply with the ordinance, and the criminal contempt sanctions levied against petitioner are therefore without effect.

However, the District Court went astray in dismissing petitioner's habeas corpus petition on the grounds that "[t]he ruling of *Walker* indicates that a party may be held in contempt for violation of a court order even though the underlying order may be unconstitutional." *See* Recorder's Transcript.

In fact, *Walker* merely upholds the constitutionality of such a rule as applied in Alabama. This Court has never held that the Alabama rule approved in *Walker* has mandatory applicability in other jurisdictions. *See In re Berry*, 68 Cal. 2d at 150. Especially where—as in California—other states have expressly rejected the Alabama rule, it would be repugnant to the principles of federalism for federal courts to gratuitously impose Alabama's collateral

bar rule in reviewing state procedures arising in other jurisdictions.

By incorrectly applying the Alabama rule to a California proceeding, the court below deprives petitioner of an important procedural right enunciated by the California Supreme Court in *In re Berry*. At the same time, the court below acquiesces in the refusal of the California courts to uphold petitioner's federal constitutional rights. This condemns petitioner to the worst of all possible worlds—the state courts have refused to uphold his federal rights, and the federal courts have failed to recognize his rights as a California citizen. In addition to its manifest injustice, such an outcome can only add to the inter-jurisdictional confusion and conflict that exists in this area.

CONCLUSION

California courts have expressly rejected Alabama's collateral bar to challenging the validity of unconstitutional directives in criminal contempt proceedings. The California rule of *In re Berry* does not conflict with this Court's decision in *Walker v. Birmingham* but simply reflects a policy choice to extend greater constitutional protections to California citizens than Alabama courts extend to citizens of that state.

Ironically, in the case at bar California's state courts have refused to extend to petitioner fundamental constitutional protections guaranteed to all Americans by the Fifth and Fourteenth Amendments to the United States Constitution. The failure of California courts to apply this

Court's regulatory takings doctrine, set forth in *Nollan v. California Coastal Commission*, leaves petitioner facing imprisonment for failure to comply with a transparently unconstitutional ordinance.

In proceedings below, the Federal District Court acknowledged the transparent invalidity of the San Francisco hotel regulation but mistakenly applied Alabama's collateral bar rule to dismiss petitioner's habeas corpus action. The District Court should have applied California's *Berry* rule, which would put at issue the constitutionality of the subject hotel ordinance.

Allowing petitioner to be jailed as a result of a misapplication of conflicting procedural rules would work an unconscionable miscarriage of justice and contribute to further confusion among the conflicting jurisdictions. Accordingly, Pacific Legal Foundation respectfully urges this Court to grant the writ of certiorari for the purpose of remanding this case to the Federal District Court to determine the constitutional validity of the challenged regulation.

DATED: June, 1992.

Respectfully submitted,

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No. 91-1972

In The

Supreme Court of the United States

October Term, 1992

ADAM SPARKS,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction and Summary of Argument 1

Statement of the Case 4

Reasons Why the Petition Should be Denied 8

I. THE STATE APPELLATE COURT'S CONTEMPT DECISION IS VALID REGARDLESS OF THE CONSTITUTIONALITY OF THE UNDERLYING ORDINANCE 8

A. Sparks Was Obligated To Obey The Injunction 8

B. Sparks Had An Opportunity To Seek Direct Review Of The Injunction But Failed To Do So 10

C. This Court Should Apply Federal Law .. 10

D. The Federal Collateral Bar Rule Applies Because Sparks Had An Opportunity For Adequate And Effective Review 12

II. THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF THE ORDINANCE'S TOURIST RENTAL PROVISIONS BECAUSE THE CONTEMPTS WERE BASED SOLELY ON SPARKS' FAILURE TO MAINTAIN RECORDS AND ALLOW AN INSPECTION 13

III. THE APPELLATE COURT CORRECTLY DECIDED THAT THE ORDINANCE IS FACIALLY CONSTITUTIONAL 14

A. The Ordinance Does Not Deny All Economically Viable Use Of The Property .. 15

TABLE OF CONTENTS – Continued

Page

B. The Ordinance Substantially Advances Legitimate State Interests 18

IV. THE COURTS BELOW CORRECTLY DECIDED THAT PETITIONER HAD NO RIGHT TO A JURY IN HIS TRIAL FOR PETTY OFFENSES... 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 15

American Savings and Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981) 16

Bethlehem Mines v. United Mine Workers, 476 F.2d 860 (3d Cir. 1973) 10

Bullock v. City and County of San Francisco, 221 Cal. App. 3d 1072 (1990) 15, 19

Cherokee Express, Inc. v. Cherokee Express, Inc., 924 F.2d 603 (6th Cir. 1991) 10

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1997 (May 18, 1992) 20

Cooper's Express Co., Inc. v. Interstate Commerce Comm'n, 330 F.2d 338 (1st Cir. 1964) 14

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 16

Glen v. Hongisto, 438 F. Supp. 10 (N.D. Cal. 1977) 10

GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980) 9

Harriman v. City of Beverly Hills, 275 Cal. App. 2d 918 (1969) 13

Howat v. State of Kansas, 258 U.S. 181 (1922) 8, 9, 11

In re Berry, 68 Cal. 2d 137 (1968) 10, 11, 15

In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722 (9th Cir. 1989) 9

In re Morelli, 11 Cal. App. 3d 819 (1970) 21

In re Novak, 932 F.2d 1397 (11th Cir. 1991) 12

TABLE OF AUTHORITIES – Continued

Page

Johansen v. San Diego County District Council of Carpenters, 745 F.2d 1289 (9th Cir. 1984) 8, 9

Karr v. Baldwin, 57 F.2d 252 (N.D. Tex. 1932) 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 17, 18

Lucus v. South Carolina Coastal Council, No. 91-453 (U.S. June 29, 1992) (WESTLAW, SCT file) . 15, 16, 20

Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 14

MacLeod v. Santa Clara County, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 17

Maness v. Meyers, 419 U.S. 449 (1975) 9

Maita v. Whitmore, 365 F. Supp. 1331 (N.D. Cal. 1973) *rev'd on other grounds*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975) 11, 21

Moore v. City of Costa Mesa, 678 F. Supp. 1448 (C.D. Cal. 1987) 17

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 3, 17, 19, 20

Oceanic California, Inc. v. City of San Jose, 497 F. Supp. 962 (N.D. Cal. 1980) 17

Pacific Telegraph & Telephone v. Superior Court, 265 Cal. App. 2d 370 (1968) 21

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 16, 17, 18, 20

Pennell v. City of San Jose, 485 U.S. 1 (1988) 14

TABLE OF AUTHORITIES – Continued

Page

People v. White, 259 Cal. App. 2d Supp. 936 (1968) 14

Rife v. Godbehere, 814 F.2d 563, *as amended*, 825 F.2d 185 (9th Cir. 1987) 21

Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984) 18

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989) 17, 19, 20

Taylor v. Hayes, 418 U.S. 488 (1974) 21, 22

Terminal Plaza v. City and County of San Francisco, 177 Cal. App. 3d 892 (1986) 15, 19

Thomas v. Collins, 323 U.S. 516 (1945) 12

Traweek v. City and County of San Francisco, 659 F. Supp. 1012 (N.D. Cal. 1984), *aff'd in part and rev'd in part*, 920 F.2d 589 (9th Cir. 1990) 16

U.S. v. May, 622 F.2d 1000 (9th Cir. 1980) 21

U.S. v. Ryan, 402 U.S. 530 (1971) 12

U.S. v. United Mine Workers, 330 U.S. 258 (1947) 8

Walker v. City of Birmingham, 388 U.S. 307 (1967) *passim*

William C. Haas & Co., Inc. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) 17

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 13

Yee v. City of Escondido, 503 U.S. ___, 112 S. Ct. 1522 (1992) 3, 19, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

California Civil Code

Section 1209 ..... 20, 21

California Government Code

Sections 7060-7060.7 17

Sections 65580, 65589.5, 65915, 66412.3 19

San Francisco Administrative Code

Chapter 41.2 4

Chapter 41.3(d) 4, 18

Chapter 41.3(e) 4

OTHER TEXT

11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960 (1973) 12

No. 91-1972

In The

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City and County of San Francisco files this brief in opposition to the Petition for a Writ of Certiorari and prays that the Writ be denied. The Ninth Circuit Court of Appeals correctly affirmed the denial of the habeas petition and upheld petitioner Adam Sparks' conviction and sentence.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an action by the City and County of San Francisco ("San Francisco" or the "City") to enforce its Residential

Hotel Unit Conversion and Demolition Ordinance (the "Ordinance"), the California Superior Court enjoined petitioner Adam Sparks from violating the Ordinance and subsequently twice held Sparks in contempt. The California Court of Appeal, in two separate unpublished decisions, upheld the preliminary injunction and six counts of contempt. The California Supreme Court denied review of both decisions.[1]

On June 17, 1991, the California Superior Court enforced the six contempt counts by ordering Sparks to surrender to the County Sheriff. The next day, Sparks filed his petition for writ of habeas corpus with the United States District Court in and for the Northern District of California. The district court denied Sparks' federal habeas petition and declined to stay his sentence pending appeal. Citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the court held that Sparks was required to serve his jail term for violating the superior court's injunction, even if he believed the Ordinance to be unconstitutional, and even if the Ordinance was ultimately held to be unconstitutional. The Ninth Circuit affirmed the denial of the habeas petition. Sparks now seeks certiorari and challenges the contempts by arguing that the Ordinance upon which the injunction was based is unconstitutional and that he was denied his right to a jury trial.

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[1] Sparks failed to seek a timely direct review in this Court of the preliminary injunction decision, but did seek certiorari as to the second appellate decision, that which upheld the six counts of contempt. This Court denied Sparks' first petition for Writ of Certiorari last year. A copy of the letter confirming denial of certiorari is attached as Appendix A to this Opposition.

Although Sparks urges this Court to declare the Ordinance's tourist rental provisions unconstitutional, Sparks' argument fails for several reasons. First, under federal law, Sparks cannot raise as a defense in this proceeding the unconstitutionality of the preliminary injunction or its underlying law. The appellate decision upholding the injunction is a final judgment that cannot now be challenged in this habeas proceeding. Second, the constitutionality of the tourist rental provisions is irrelevant given that Sparks was not held in contempt for violating the injunction's tourist rental provisions; rather, Sparks was found guilty of violating the injunction's basic recordkeeping and inspection requirements – requirements that raise no constitutional issues. Finally, even if this Court were to reach the issue of the constitutionality of the Ordinance's tourist rental provisions, the Ordinance does not effect a taking as Sparks alleges.

The petition to this Court attempts to manufacture a false conflict between the holding of the California Court of Appeal and the federal courts. Given that the federal courts have yet to rule on the constitutionality of the Ordinance, and that the state appellate court's opinion is fully consistent with this Court's decisions in *Nollan* and *Yee*, Sparks' predictions regarding the content of any *future* federal decisions are speculative at best.

This Court must also reject Sparks' attempt to concoct a conflict between the California and New York courts. Sparks' argument is predicated on a patent misconstruction of the Ordinance. In reality, the San Francisco law is distinguishable from the New York City law

and thus warrants different treatment under the Constitution. This case presents no conflict in decisions and the petition should be denied.

STATEMENT OF THE CASE

The San Francisco Residential Hotel Unit Conversion and Demolition Ordinance ("the Ordinance") was enacted in 1979. It represented San Francisco's legislative response to the widespread conversion of residential hotels to tourist hotels that was causing a serious shortage of housing in San Francisco. *S.F. Admin. Code* Chap. 41.2. Similar to zoning provisions, the Ordinance froze in place the number of residential and tourist rooms at certain residential hotels and regulated future change.[2]

The San Francisco Board of Supervisors enacted the Ordinance on the basis of a study by San Francisco's Department of City Planning. The study showed that the number of residential housing units in the City had decreased by nearly 20% between 1975 and 1979 due to the "vacation, conversion or demolition" of residential hotels. *Id.*, chap. 41.3(d). The Board found that "a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households," people who traditionally had rented rooms at residential hotels. *Id.*, chap. 41.3(e).

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[2] Contrary to the allegations set forth in Sparks' and Pacific Legal Foundation's briefs, the Ordinance does not set or limit the hotel's rental rates; it merely regulates the length of stay of the hotel's tenants.

Sparks purchased the Sequoia Hotel in 1984, more than three years after the Ordinance went into effect and with full knowledge of its restrictions. Initially, Sparks operated the hotel as a residential hotel, consistent with its historical use. Following a minor fire, however, Sparks renovated the hotel with the specific goal of operating it illegally as a tourist hotel. In July 1987, the hotel was renamed the Pacific Bay Inn and re-opened as a tourist hotel despite the Ordinance's prohibitions. Beginning in July 1987, and continuing until today, Sparks has operated the Pacific Bay Inn as a tourist hotel.

Because of Sparks' flagrant violations of the Ordinance, the City filed an enforcement action in December 1987. (California Superior Court, *CCSF v. Pacific Bay Inn and Adam Sparks*, No. 885-533.) The City alleged violation of the Ordinance as well as of the City's zoning laws that prohibited the operation of the Pacific Bay Inn as a tourist hotel in a residential neighborhood.[3] Sparks cross-complained, alleging that the City's enforcement of the Ordinance violated his constitutional rights.[4]

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[3] Sparks, a licensed real estate agent, purchased the hotel with knowledge that the property was zoned RC-4. Under RC-4 zoning, use as a tourist hotel was prohibited unless the property owner had obtained a conditional use permit.

[4] The City's case was subsequently consolidated with an action against Sparks by the Tenderloin Housing Clinic, a non-profit housing organization. On August 26, 1991, and following a three-day court trial, Judge Richard Figone of the California Superior Court announced his tentative decision in favor of plaintiffs. Judge Figone found that Sparks had purchased his hotel in 1984 with the intent of making a profit as a tourist

(Continued on following page)

On April 6, 1988, the California Superior Court issued a Preliminary Injunction ordering Sparks to comply with the Ordinance by (1) not renting more than a certain number of units for tourist use; (2) keeping and posting specified records; and (3) allowing administrative inspections by City inspectors. Sparks argued that the Ordinance was unconstitutional and, on that basis, appealed the issuance of the Preliminary Injunction to the California Court of Appeal. The Preliminary Injunction remained in effect throughout the appeal.

In November 1990, the California Court of Appeal upheld the Injunction, finding the Ordinance to be constitutional on its face. As to Sparks' claims that the Ordinance was unconstitutional as applied, the appellate court held that the record did not disclose that Sparks had exhausted his remedies. Sparks' request for review by the California Supreme Court was denied on March 20, 1991.

In February 1989, the superior court found Sparks in contempt on 32 separate violations of the Preliminary Injunction. Remarkably, even *after* being held in contempt in February, Sparks continued to ignore the Injunction. Thus, in November 1989, Superior Court Judge Claude D. Perasso *again* held Sparks in contempt, finding beyond a

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(Continued from previous page)

hotel. Moreover, in violation of the City's zoning laws, Sparks operated his hotel as a tourist hotel despite the fact that he had never applied for or obtained the proper permits to run a tourist hotel in a residential neighborhood. Accordingly, Judge Figone permanently enjoined Sparks from operating the Pacific Bay Inn as a tourist hotel.

reasonable doubt that Sparks' defiance of the court's Injunction "ha[d] been intentional, willful and with the intent to frustrate the processes of [the Superior] Court."

Sparks filed petitions for writs of habeas corpus and certiorari in the California Court of Appeal. The appellate court stayed enforcement of both contempt orders and undertook review. In January 1991, the Court of Appeal upheld six counts of contempt and annulled the other counts citing evidentiary defects. These six counts were based solely on Sparks' violation of the Injunction's recordkeeping and inspection provisions. Specifically, Sparks had failed to keep and post records required under the Ordinance, and had deliberately obstructed a City inspection in September 1989.

On June 17, 1991, Superior Court Judge Richard Figone enforced the six contempt counts by issuing an Order of Commitment that directed Sparks to surrender to the County Sheriff at 9:00 a.m. on June 19, 1991. Sparks filed his petition for writ of habeas corpus with the district court the next day.

Judge John P. Vukasin of the Northern District of California dismissed Sparks' habeas petition and declined to stay his sentence pending appeal. Citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the court held that Sparks was required to serve his jail term for violating the superior court's Injunction, even if he believed the Ordinance to be unconstitutional, and even if the Ordinance was ultimately held to be unconstitutional. On appeal, the Ninth Circuit affirmed the denial of Sparks' habeas petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE STATE APPELLATE COURT'S CONTEMPT DECISION IS VALID REGARDLESS OF THE CONSTITUTIONALITY OF THE UNDERLYING ORDINANCE.

A. Sparks Was Obligated To Obey The Injunction.

Federal courts have long held that a party cannot challenge a contempt citation for violation of an injunction by raising the constitutionality of the underlying ordinance as a defense. *U.S. v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. State of Kansas*, 258 U.S. 181 (1922); *Johansen v. San Diego County District Council of Carpenters*, 745 F.2d 1289 (9th Cir. 1984). Thus, in the seminal case of *Walker v. City of Birmingham*, 388 U.S. 307 (1967), this Court held that violation of a duly issued court order may be properly punished as contempt, *even if the underlying statute or ordinance upon which the injunction is based is later found to be unconstitutional.*

In *Walker*, petitioners were prominent civil rights activists who were held in contempt by an Alabama court for violating an injunction prohibiting a scheduled civil rights march. That injunction was based on a Birmingham ordinance that petitioners contended was unconstitutional on its face.

This Court recognized that "the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues. . . ." 388 U.S. at 316. Nevertheless, *this Court upheld the finding of contempt*, quoting its decision in *Howat v. State of Kansas*, 258 U.S. 181 (1922):

> "An injunction duly issuing out of a court of general jurisdiction . . . must be obeyed . . . however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case.
>
> It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, *its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.*"

388 U.S. at 314 (quoting *Howat v. State of Kansas*, 258 U.S. at 189-190) (emphasis added).

More recently, in *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), this Court echoed the reasoning of *Walker*, holding that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." 445 U.S. at 386 (citations omitted). *See also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976); *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-28 (9th Cir. 1989); *Johansen v. San Diego County District Council of Carpenters*, 745 F.2d 1289 (9th Cir. 1984). In the present case, the district court correctly applied these decisions in denying Sparks' habeas petition.

B. Sparks Had An Opportunity To Seek Direct Review Of The Injunction But Failed To Do So.

The rule of *Walker* is especially applicable where, as here, the contemnor had an opportunity to challenge the validity of the injunction but failed to do so. Thus, because Sparks failed to seek timely review in this Court of the appellate court's preliminary injunction decision, that decision cannot be challenged in this habeas proceeding. *Cf. Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 607 (6th Cir. 1991) ("An appeal from a finding of contempt does not put in issue the validity of the underlying judgment from which the party has failed to perfect a timely appeal"); *Bethlehem Mines v. United Mine Workers*, 476 F.2d 860 (3d Cir. 1973) (if a party fails to appeal from a preliminary injunction that has been violated, the validity of the injunction is not at issue on appeal and cannot be urged as grounds to vacate the contempt order).

C. This Court Should Apply Federal Law.

Citing *In re Berry*, 68 Cal. 2d 137 (1968), Sparks attempts to circumvent *Walker* by asking this Court to "defer" to California state law to determine whether he can challenge the constitutionality of the Ordinance in his federal habeas proceeding. In short, Sparks seeks to apply a California case over directly controlling United States Supreme Court authority. This argument runs roughshod over the consistent line of cases following *Walker*, and finds no support in logic or in law. *E.g., Glen v. Hongisto*, 438 F. Supp. 10, 16 n.10 (N.D. Cal. 1977) ("While petitioners urge that this Court adopt the *Berry*

rule as the law of the case, such a course would be improper *in this federal court proceeding.*") (emphasis added). For example, in *Maita v. Whitmore,* 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds,* 508 F.2d 143 (9th Cir. 1974), *cert. denied,* 421 U.S. 947 (1975), the court applied *Walker,* not *Berry:*

> Petitioner apparently believes that the First Amendment entitled him to litigate the obscenity issue twice – once at the time the temporary injunction is issued and once at any subsequent contempt hearing. As was discussed above, . . . [o]nce . . . an injunction [is] properly issued, *the only consideration before the court in a contempt proceeding is if petitioner in fact violated the terms of the injunction.*

365 F. Supp. at 1336, citing *Walker* (emphasis added) (footnote omitted).

Nothing in *Howat, Walker, Maita,* or any other federal case suggests that the federal court should defer to or apply the state court procedure. Indeed, *Walker* implies just the opposite: The *Walker* Court uses the *federal* rule as the standard against which the state court rule of law must be compared. *Walker,* 388 U.S. at 314 (The Kansas "rule of state law accepted and approved in *Howat v. State of Kansas* is consistent with the *rule of law followed by the federal courts.*") (emphasis added).

Adam Sparks may disagree with the Residential Hotel Ordinance. But it is not the Ordinance or its alleged unconstitutionality that is at issue here. Thus, under the federal collateral bar rule enunciated in *Walker* and relied upon by the federal courts below, the appellate court's contempt decision is valid regardless of the Ordinance's constitutionality.

D. The Federal Collateral Bar Rule Applies Because Sparks Had An Opportunity For Adequate And Effective Review.

Relying on an isolated passage in *Walker*, Sparks next argues that *Walker* does not apply to him because he purportedly exhausted his state court remedies. Sparks' construction of *Walker* is perverse: The exception to the collateral bar rule applies to petitioners who are *denied* adequate or effective state court review, not to those such as Sparks who had the advantage of such review. The rationale is that a party who is denied state court review must be given such an opportunity in federal court – else they would have no opportunity for review at all. As stated by Wright & Miller, "[I]t is the opportunity for effective review that bars later challenge in a contempt proceeding." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960, at 598 (1973). *Accord, In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991) (an exception to the collateral bar rule applies where the state court provides *no opportunity* for review) (citing *U.S. v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972)); *U.S. v. Ryan*, 402 U.S. 530, 532 n.4 (1971).

Thomas v. Collins, 323 U.S. 516 (1945), cited by Sparks, is wholly inapposite. *Thomas* predates *Walker*, and does *not* address the collateral bar rule. The *Thomas* Court simply assumes that it has jurisdiction over, and proceeds to address, the constitutional question. 323 U.S. at 524 n.7. Moreover, the statute and injunction in *Thomas* constituted a prior restraint on speech, thus creating a special constitutional circumstance that is not present here.

Here there is no question of the superior court's jurisdiction, and Sparks has availed himself of both the state *and* federal review procedures. The fact that he has not succeeded does not create an exception to *Walker*. The federal courts below correctly applied *Walker*, and Sparks' petition for certiorari should be denied.

II. THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF THE ORDINANCE'S TOURIST RENTAL PROVISIONS BECAUSE THE CONTEMPTS WERE BASED SOLELY ON SPARKS' FAILURE TO MAINTAIN RECORDS AND ALLOW AN INSPECTION.

If this Court does not apply *Walker* and reaches the constitutionality of the underlying order, the only issue is whether the *basis* for the contempt is constitutional. As stated earlier, the six counts of contempt before this Court are based *solely* on Sparks' willful violation of the superior court's order to (a) maintain records and notices; and (b) allow City inspections. These are ministerial acts that Sparks easily could have performed regardless of the other aspects of the Ordinance, and they do not implicate *any* constitutional right.[5]

A government requirement to maintain daily business registers does not violate any federal constitutional right. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Harriman v. City of Beverly Hills*, 275 Cal.

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[5] Because the Ordinance contains a severability clause, Sparks was required to comply with the recordkeeping and inspection provisions, even if he believed that the tourist rental provisions were unconstitutional.

App. 2d 918 (1969). Likewise, government requirements that a business or property owner permit inspection of records are constitutionally permissible. *See Cooper's Express Co., Inc. v. Interstate Commerce Comm'n*, 330 F.2d 338 (1st Cir. 1964); *People v. White*, 259 Cal. App. 2d Supp. 936 (1968); *Karr v. Baldwin*, 57 F.2d 252 (N.D. Tex. 1932). Given the City's legitimate interest in knowing the scope and size of its housing stock, the Ordinance's reporting and inspection requirements are valid independent of the tourist rental provisions.

The finding of contempt against Adam Sparks for failing to maintain records and allow inspections violated no constitutional right. Thus, the constitutionality of the Ordinance's tourist rental provisions is irrelevant. Indeed, because this case can be disposed of on nonconstitutional grounds, this Court should not address the constitutionality of the Ordinance's tourist rental provisions. *See Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

III. THE APPELLATE COURT CORRECTLY DECIDED THAT THE ORDINANCE IS FACIALLY CONSTITUTIONAL.

Assuming *arguendo* that Sparks could hurdle the first two obstacles and establish that (1) the *Walker* rule does not apply, and (2) a constitutional issue is raised by recordkeeping and inspection requirements, the contempt finding should still be upheld because the underlying Ordinance is constitutional on its face.

The California Court of Appeal has thrice considered the issue and held the Ordinance to be facially constitutional. *See Terminal Plaza v. City and County of San Francisco,* 177 Cal. App. 3d 892, 912 (1986) (court explicitly rejects argument that the Ordinance effects an unconstitutional "taking" of property); *Bullock v. City and County of San Francisco,* 221 Cal. App. 3d 1072 (1990); and *Sparks v. City and County of San Francisco.*[6]

Despite this precedent, Sparks asserts that the Ordinance is facially invalid on the theory that it effects a taking without just compensation in violation of the Fifth Amendment. The party challenging a government regulation as a taking must demonstrate that the statute either (1) denies all economically viable use of the subject property, or (2) does not substantially advance legitimate state interests. *See Lucas v. South Carolina Coastal Council,* No. 91-453 (U.S. June 29, 1992) (WESTLAW, SCT file); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). Sparks' argument fails on both counts.[7]

A. The Ordinance Does Not Deny All Economically Viable Use Of The Property.

The fact that some restrictions have been imposed upon Sparks' use of his property does not establish that a

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[6] In contrast, the order at issue in *Berry* had never undergone judicial scrutiny.

[7] Even before this Court can address Sparks' takings claim, Sparks must establish that he exhausted his administrative remedies. As set forth earlier, the California Court of Appeal found that Sparks had not done so.

taking has occurred. Regulation of private property constitutes inverse condemnation only where the regulation denies the landowner *all* reasonable economic and beneficial use of the property. *See Lucas v. South Carolina Coastal Council,* No. 91-453 (U.S. June 29, 1992) (WESTLAW, SCT file); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987); *American Savings and Loan Ass'n v. County of Marin,* 653 F.2d 364, 368 (9th Cir. 1981) (citing *Agins, supra*).

The Supreme Court has provided no "set formula" to determine when economic injuries caused by public action must be compensated by the government. However, in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978), this Court discussed several factors that bear on this issue: (1) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (2) the character of the governmental action (*i.e.,* is it a physical invasion or merely an adjustment of the benefits and burdens of economic life).

Here, the Ordinance has not interfered with any of Sparks' *reasonable,* investment-backed expectations. When Sparks purchased the hotel in 1984, he was aware that historically it had been a residential hotel and was subject to the Ordinance. This situation is similar to that in *Traweek v. City and County of San Francisco,* 659 F. Supp. 1012 (N.D. Cal. 1984), *aff'd in part and rev'd in part,* 920 F.2d 589 (9th Cir. 1990), where the court rejected a takings claim because *the owner could continue an existing use*: "[T]he plaintiffs bought into a heavily regulated situation and were on notice that the City's condominium conversion regulations were subject to annual review." *Id.* at 1026.

Sparks bought a residential hotel with full knowledge of the Ordinance. He had no *reasonable* investment-backed expectation that he would be able to defy the law. Thus, he cannot meet the *Penn Central* test. *See MacLeod v. Santa Clara County*, 749 F.2d 541, 548-549 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009; *Moore v. City of Costa Mesa*, 678 F. Supp. 1448, 1451 (C.D. Cal. 1987) (no taking where property owner "able to continue to use his property for his home and business; he has merely been unable to build a new and more profitable building to replace the current buildings"); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 973-977 (N.D. Cal. 1980).

Moreover, the Ordinance does not result in a permanent physical invasion. This fact distinguishes the Ordinance from the laws at issue in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), as well as *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), the case relied on by Sparks.

In *Seawall*, the New York law required owners to rehabilitate and rent units to tenants; a vacancy constituted a violation of the ordinance. Here, no such forced rental exists. The City does not require hotel owners either to rehabilitate units or to keep them occupied. Indeed, the owner is free to go out of the residential market entirely under California law. *See* Cal. Gov't Code §§ 7060-7060.7. Thus, the Ordinance does not result in a physical invasion. It affects only economic use of the property and is precisely the sort of governmental action that results merely in "an adjustment of the benefits and

burdens of economic life." *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 124.

B. The Ordinance Substantially Advances Legitimate State Interests.

The second prong of the takings analysis involves a determination as to whether the legislation advances a legitimate state interest. In the late 1970's, San Francisco's Department of City Planning conducted a study of the City's housing market. The study showed that the number of residential hotel units in the City had decreased by nearly 20% between 1975 and 1979 due to the "vacation, conversion or demolition" of residential hotels. *S.F. Admin. Code* Chap. 41.3(d).

Concerned that further elimination of residential units would exacerbate the housing shortage, the San Francisco Board of Supervisors enacted the Ordinance to halt the conversion trend, preserve the residential housing stock, and maintain a proper balance between residential and commercial uses. The Ordinance accomplishes its legitimate state goals by regulating conversion or demolition of residential hotel rooms and by requiring one-for-one replacement if such residential units are converted to nonresidential uses.[8]

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[8] That states have broad powers to regulate housing conditions is beyond dispute. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) (law limiting ability to demolish single room occupancy buildings in New York City, specifically

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Because of this "fit" between the Ordinance and its legitimate purpose, the California Court of Appeal has upheld the constitutionality of the Ordinance in three well-reasoned opinions. Thus, in *Terminal Plaza v. City and County of San Francisco, supra,* 177 Cal. App. 3d at 912 (1986), *Bullock v. City and County of San Francisco, supra,* and *Sparks v. City and County of San Francisco,* the courts held that the Ordinance did not amount to a taking. Sparks urges this Court to ignore the *Terminal Plaza* decision. Alternatively, he argues that *Terminal Plaza* was overruled by the Supreme Court in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and, more recently, in *Yee v. City of Escondido,* 503 U.S. ___, 112 S. Ct. 1522 (1992).

Contrary to Sparks' assertion, *Nollan* did not radically alter the traditional takings analysis. *Nollan* held that a higher judicial scrutiny of government regulation may be required where the police power involves a *physical invasion* of the property, such as the exaction of a public easement across the plaintiff's property in that case, 483 U.S. at 841.[9] However, with respect to other

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intended to protect the poor and elderly occupants of these buildings, had a valid purpose). Moreover, the State of California has recognized that provision of housing for all economic segments of society should be a government priority. *See* Cal. Gov't Code §§ 65580, 65589.5, 65915, and 66412.3.

[9] Similarly, under the reasoning of *Nollan,* the forced rentals at issue in the *Seawall* case effected a physical taking in that the hotel owners were required to rent their property to

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regulation of property rights that do not constitute a physical encroachment on land, such as the regulation at issue in this case, *Nollan* does not change the existing test: Land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. *Lucas v. South Carolina Coastal Council*, No. 91-453 (U.S. June 29, 1992) (WESTLAW, SCT file); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1997 (May 18, 1992).[10] Under *Lucas*, *Nollan*, and *Commercial Builders*, the Ordinance must be upheld as a constitutional regulation of land use.

IV. THE COURTS BELOW CORRECTLY DECIDED THAT PETITIONER HAD NO RIGHT TO A JURY IN HIS TRIAL FOR PETTY OFFENSES.

Sparks also asserts that he was entitled to a jury trial on charges of violating California Civil Code Section

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strangers, 542 N.E.2d at 1062-63. In contrast, there is no physical invasion under the San Francisco Ordinance because vacancy does not constitute a violation of San Francisco's Ordinance. *Seawall* is also distinguishable because the New York law did not advance its stated purpose of alleviating the homelessness problem. San Francisco's one-for-one replacement provisions, however, do advance the City's goals of preserving the available residential housing stock.

[10] Similarly, nothing in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992), changes the factors to be analyzed in a takings claim: the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

1209. The charge of contempt under Section 1209 is a "petty offense" that is punishable by no more than five days in jail and a one thousand dollar fine. Petty offenses do not require a jury trial. *See Taylor v. Hayes*, 418 U.S. 488, 495 (1974); *In re Morelli*, 11 Cal. App. 3d 819, 850 (1970); *Pacific Telegraph & Telephone v. Superior Court*, 265 Cal. App. 2d 370, 375 (1968).

Sparks attempts to create a jury "right" where none exists by aggregating the penalties to which he *might* have been subjected under the 178 separate counts of contempt originally found by the trial court. But Sparks was not entitled to a jury trial on any *one* of those 178 counts. Thus, the assertion that Sparks' potential sentence raises a constitutional right to a jury is without merit.

Finally, even assuming *arguendo* that Sparks had been entitled to a jury trial, any constitutional violation was remedied when the appellate court upheld only six counts of contempt and imposed a sentence of less than six months in jail and less than $5,000 in fines. *See Taylor v. Hayes, supra* (trial by jury not required where state reduces sentence to six months or less); *Rife v. Godbehere*, 814 F.2d 563, *as amended*, 825 F.2d 185 (9th Cir. 1987) (constitutional violation remedied by state court's ultimate imposition of sentence that would not trigger jury trial right); *Maita v. Whitmore*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975) (jury trial not required where trial judge later reduces sentence to less than six months); *U.S. v. May*, 622 F.2d 1000, 1005 (9th Cir. 1980).

In *Taylor*, the Kentucky trial court, without a jury, convicted the defendant of criminal contempt and imposed consecutive sentences aggregating almost four

years' imprisonment. The trial judge subsequently amended the sentence but left open the question of whether the sentences were to run concurrently or consecutively. The Kentucky Court of Appeals affirmed, but amended the sentence to run concurrently, thereby imposing a six month jail sentence and curing the jury trial right violation. 418 U.S. at 495-96.

On review, this Court held that because the actual penalty imposed was no more than a six month sentence, the contemnor's right to jury trial had not been violated. More importantly, this Court held that after the contemnor's conviction, the state could reduce a sentence rather than retry the contempt with a jury:

> It is argued that a State should not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial. The thrust of our decisions, however, is to the contrary: in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury. In either case, the State itself has determined that the contempt is not so serious as to warrant more than a six-month sentence. We remain firmly committed to the proposition that "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved."

418 U.S. at 496 (citations omitted).

In the instant case, because the California legislature did not authorize a "serious" penalty, the state courts were free to reduce Sparks' sentence in order to cure any constitutional violation and obviate a jury trial. Thus, even if the trial court *had* violated Sparks' right to a jury trial, this violation was cured when Sparks' penalty was ultimately reduced on appeal to six days in jail and $3,000 in fines – well below the demarcation point for the right to jury trial.

CONCLUSION

No court issues contempt findings lightly. Two California state court judges and a federal district court judge believed that Sparks' intentional violation of the injunction was serious and required an appropriate sanction. There is a strong public interest in upholding injunctions issued by state court judges and in allowing penalties to be enforced for violating those injunctions. Sparks' petition for a writ of certiorari should be denied.

DATED: July 6, 1992

Respectfully submitted,

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APPENDIX 1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 4, 1991

Ms. Violet Elizabeth Grayson
3128 Clay Street
San Francisco, CA 94115

Re: Adam Sparks v. Superior Court of the City and County of San Francisco (City and County of San Francisco, Real Party)
No. 91-85

Dear Ms. Grayson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk